Supreme Court, U.S.
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No. 04-___

IN THE

Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, AND JOHN DOE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *pro se* prisoner's untimely notice of appeal, filed within seven days after the prisoner received notice of entry of judgment and drawing attention to the fact that the prisoner acted promptly after receiving notice of entry of judgment, can be construed as a motion to reopen the time to file a notice of appeal under Rule 4(a)(6) of the Federal Rules of Appellate Procedure?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel T. Poole respectfully seeks a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 368 F.3d 263 (3d Cir. 2004), and appears in this Petition's Appendix ("Pet. App.") at 1a-12a. The court of appeals' first order denying the petition for rehearing and rehearing *en banc* appears at Pet. App. 23a-24a. The amended order denying the petition for rehearing and rehearing *en banc* appears at Pet. App. 25a-26a. The opinion of the district court is unreported and appears at Pet. App. 13a-22a.

JURISDICTIONAL STATEMENT

The court of appeals entered its decision on May 13, 2004. The court of appeals denied the petition for rehearing and rehearing *en banc* on June 8, 2004, in an order indicating that Judge Friedman, who had sat by designation on the panel, would have granted panel rehearing. An amended order, dated June 15, 2004, removed the reference to Judge Friedman's having voted for panel rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of Rule 4(a) of the Federal Rules of Appellate Procedure appears at Pet. App. 29a-32a. Rule 4(a)(6), which is of particular relevance here, provides:

> (6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the

moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

STATEMENT

This case presents an important and recurring question of federal law that has divided the courts of appeals. Federal Rule of Appellate Procedure 4(a)(6) authorizes federal district courts to reopen the time for appeal in cases in which the would-be appellant has not received notice within 21 days after entry of judgment. This case presents the question whether a *pro se* plaintiff's untimely notice of appeal, filed with seven days after the plaintiff received notice of entry of judgment and mentioning the late receipt, can be construed as a motion to reopen the time for appeal under Rule 4(a)(6).

In the decision below, the Third Circuit held that Rule 4(a)(6) requires the filing of a formal motion and that a notice of appeal can never suffice. The court acknowledged that the Eleventh Circuit has taken precisely the opposite view—at least in those cases in which a *pro se* plaintiff files a notice of appeal that mentions late receipt of notice of entry of judgment. The court failed, however, to notice that the established practice in the circuits is much more heavily to the contrary than a single reported decision from the Eleventh Circuit might suggest. The First, Second, Fourth, and Tenth Circuits have all sided with the Eleventh Circuit, and the District of Columbia Circuit has suggested that it would consider treating a *pro se* filing as a Rule 4(a)(6) motion if the filing made clear that timeliness was an issue. The Ninth Circuit has taken an intermediate position; it

ordinarily requires a formally noticed motion but permits district courts to dispense with that requirement at their discretion.

And the split may be even wider than that. The issue is not one that is likely to produce many published opinions. A court of appeals confronts the question only if the would-be appellant knows enough to mention in his notice of appeal that he received notice of entry of judgment late, but not enough to file a formal Rule 4(a)(6) motion. By definition, then, these would-be appellants—typically *pro se* prisoners, if petitioner's research is any indication—are not going to be in a position to argue about the intricacies of Rule 4(a)(6). While a court of appeals could choose to respond to an untimely notice of appeal by launching, *sua sponte*, into an extended discussion of Rule 4(a)(6), the more likely response is a remand to the district court with brief instructions to consider whether the would-be appellant can satisfy Rule 4(a)(6) or a curt dismissal on timeliness grounds. And, indeed, several of the decisions discussed below are short unpublished orders.

The issue is, however, no less important and recurs no less frequently for that. Quite the contrary, the fact that many decisions are likely to be unpublished suggests that the cases petitioner discusses below represent the tip of the iceberg. And what is at stake in these cases is nothing less than access to the courts of appeals, which for many litigants means access to justice. The divide among the circuits on this point is a real one, with real consequences for a large pool of litigants. This Court should act now to establish a single rule for the entire country.

The Federal Rules of Appellate Procedure

Federal Rule of Appellate Procedure 4(a) deals with the timing of appeals in civil cases. Rule 4(a)(1)(A) requires the filing of a notice of appeal "with the district clerk within 30 days after the judgment or order appealed from is entered."

Before 1991, Rule 4(a) provided just one way for a party to seek relief from the ordinary time limit. Rule 4(a)(5) authorized (and still authorizes) a party to move within 30 days after the Rule 4(a)(1) time limit has expired for an extension of the time in which to file an appeal. A party seeking relief under Rule 4(a)(5) must show "excusable neglect or good cause."

The Advisory Committee recognized, however, that Rule 4(a)(5) could be too "strict" in cases in which a party missed the deadline because he or she did not receive notice of entry of judgment in time. Rule 4(a)(6) was added in 1991, along with companion amendments to Federal Rule of Civil Procedure 77(d), "to permit district courts to ease strict sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." Fed. R. Civ. P. 77 advisory committee's note. Rule 4(a)(6) authorizes a party who does not receive notice of entry of judgment in a timely fashion to move in the district court to reopen the period for filing an appeal.

There are four elements that a party must satisfy to qualify for relief under Rule 4(a)(6). First, the party must establish that he or she was entitled to notice of entry. Second, the party must establish that he or she did not receive notice from the district court, the district clerk, or any party within 21 days of entry. Third, the party must establish that no other party will be prejudiced by the extension. The Advisory Committee has explained that "prejudice" means "some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal." Fed. R. App. P. 4 advisory committee's note. Fourth, the party must show that he or she submitted a motion within 180 days of entry or within seven days of receipt of notice of entry, whichever is earlier. If each of the four elements is met, the district court may reopen time for appeal for a period of 14 days from the date of entry of the order granting the motion.

See Fed. R. App. P. 4(a)(6); *see also* 20 James W. Moore, *Moore's Federal Practice* §304.14[3] (3d ed. 1999).

The Present Action

Petitioner Samuel Poole filed this action on May 4, 2001, while incarcerated in Smyrna, Delaware. His "Petition for Writ of Habeas Corpus" alleged that several public officials involved in two family court proceedings interfered with his right of access to his son—violating his Fifth and Fourteenth Amendment rights. The District Court construed the petition as a complaint filed under 42 U.S.C. § 1983. Pet. App. 13a.

On March 24, 2002, Poole was transferred from the Smyrna, Delaware prison to one in Graterford, Pennsylvania. Two days later, the district court *sua sponte* entered an order dismissing the claims as to two of the defendants for lack of personal jurisdiction, and dismissing the remaining claims as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). Pet. App. 21a-22a.

Unaware of Poole's new address—despite the fact that Poole had earlier sent the district court a note bearing his new address—the district court clerk mailed notice of entry of judgment to the Delaware prison in late March 2002. The letter was not returned to the clerk as undeliverable until April 24, 2002—29 days after it was first mailed. Upon receiving the returned notice, the clerk promptly requested a new address from the Department of Corrections and on April 29, 2002, mailed notice of entry to Poole at the prison in Graterford, Pennsylvania. Pet. App. 3a.

Poole received notice of entry of judgment on May 6, 2002. He filed his notice of appeal three days after receiving the notice, on May 9, 2002, which was within the period allowed by Rule 4(a)(6) for a motion to reopen. In his notice of appeal, Poole used underlining to draw particular attention to the fact that he did not receive notice of entry of judgment until May 6, 2002. Pet. App. 40a.

The Third Circuit's Decision

On May 13, 2004, the Third Circuit issued its decision dismissing Poole's appeal. The court found that it "lacked jurisdiction" to entertain the appeal and declined to grant Poole relief under Rule 4(a)(6).

Noting that Rule 4(a)(1) generally requires a notice of appeal to be "filed with the district court within 30 days after the judgment or order appealed from is entered" the court determined that Poole had filed his notice of appeal 44 days after the entry of judgment, and thus out of time. Since "[t]he timeliness of an appeal is a mandatory jurisdictional prerequisite," Pet. App. 2a, and Poole was not entitled to tolling under a Third Circuit doctrine that extends the appeal period for *pro se* prisoners under certain limited circumstances, Pet. App. 3a-6a, the court concluded that it would lack jurisdiction to hear the appeal unless Poole was entitled to seek relief under Rule 4(a)(6), Pet. App. 6a.

Poole received notice on May 6, 2002, and therefore had until May 13, 2002 to move to reopen the time for appeal under Rule 4(a)(6). Poole filed his notice of appeal during that seven-day period. The question for the court was therefore whether it could possibly "construe his notice of appeal as a motion to reopen." Pet. App. 7a.

The court answered that question in the negative. It reasoned that Rules 4(a)(5) and 4(a)(6) should receive parallel constructions. Because the Third Circuit has interpreted Rule 4(a)(5) as requiring a formal motion and not just a notice of appeal, the court concluded that Rule 4(a)(6) requires a formal motion as well. Pet. App. 7a-9a.

The court acknowledged that its decision was in direct conflict with the Eleventh Circuit's decision in *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997) (per curiam), and stated that it did not find that court's reasoning persuasive. In particular, the Third Circuit panel rejected the

Eleventh Circuit's arguments that Rule 4(a)(6) is less strict than Rule 4(a)(5) and that *pro se* submissions should receive a more liberal construction than ordinary submissions. The court also dismissed the *Sanders* court's concern that prison officials may act to prevent prisoners from receiving notice until after the time to appeal has expired, calling the scenario an "extreme hypothetical." Pet. App. 9a-11a.

Despite that, the Third Circuit allowed that its holding "may lead to harsh results under both rules, and it may be that it would be preferable to treat a *pro se* notice of appeal as a motion under both rules." The court felt itself bound, however, to read "Appellate Rules 4(a)(5) and 4(a)(6) ... consistently" in light of existing circuit precedent, and therefore declined to endorse the less "harsh" and possibly "preferable" result. Pet. App. 11a.

The court accordingly concluded that Poole's notice of appeal was not timely filed and dismissed the appeal for lack of jurisdiction. Pet. App. 12a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE OTHER COURTS OF APPEALS.

The Third Circuit's decision directly conflicts with decisions of the First, Second, Fourth, Tenth, and Eleventh Circuits. Those courts have held that a *pro se* prisoner's late notice of appeal may be construed as a Rule 4(a)(6) motion to reopen the time to appeal—at least in those cases in which the notice of appeal draws some attention to the timeliness problem. The D.C. Circuit has suggested that under appropriate circumstances, it might accept a *pro se* notice of appeal as a motion to reopen. While no other court of appeals has adopted the Third Circuit's "harsh" position, the Ninth Circuit has held that Rule 4(a)(6) ordinarily requires a formal motion, subject to the district court's discretion.

As noted above, the Third Circuit recognized that it was creating a conflict, although it did not appreciate the conflict's full extent. A large portion of the decision below addresses the Eleventh Circuit's decision in *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997) (per curiam). Sanders, proceeding *pro se*, sought to appeal the district court's denial of his habeas petition. In his notice of appeal, he stated that he did not receive the district court's order until after the Rule (4)(a)(1) deadline had passed. *See id.* at 186. The court of appeals initially dismissed Sanders's appeal for lack of jurisdiction.

Sanders asked the court to reconsider, and upon reconsideration, the court vacated its earlier order and construed the late notice of appeal as a motion to reopen the time for appeal pursuant to Rule 4(a)(6). The court held that if Sanders could prove his allegations of having received notice of entry of judgment late, the most appropriate means of obtaining an extension would be through Rule 4(a)(6), not Rule 4(a)(5). The court noted that there are "powerful reasons" to permit the reopening of time to appeal "when a *pro se* litigant files a late notice of appeal because he did not receive notice of the entry of the order or judgment from which he seeks to appeal." 113 F.3d at 187. The court explained that because Rule 4(a)(6) was added to the Federal Rules of Appellate Procedure to create "more liberal provisions for extension of time" where a litigant has received notice of entry of judgment late, it makes sense that potential Rule 4(a)(6) motions should be treated "differently" and "more favorably" than potential Rule 4(a)(5) motions. *Id.* The court emphasized that if it dismissed Sanders's claim, he would be shut out from any chance to appeal the district court's order through no fault of his own. The court also expressed concern that denying a *pro se* prisoner any relief from prison delay would leave prison officials able to block access to appellate courts by slowing the delivery of mail. These reasons, combined with the duty liberally to construe *pro se* pleadings, led the court to hold that "when a

pro se appellant alleges that he did not receive notice of the entry of judgment . . . within twenty-one days of its entry, we must treat his notice as a Rule 4(a)(6) motion." *Id.* The panel remanded the case to the district court with instructions to determine whether Sanders satisfied Rule 4(a)(6)'s requirements.

The circuit split extends, however, well beyond the Third and Eleventh Circuits. The Tenth Circuit, like the Eleventh, is on record in a published decision as holding that an untimely notice of appeal can be construed as a Rule 4(a)(6) motion to reopen the time to appeal. In *Ogden v. San Juan County*, 32 F.3d 452 (10th Cir. 1994), the plaintiff, proceeding *pro se*, attempted to appeal the dismissal of his § 1983 action. Ogden filed a late notice of appeal in which he noted that he did not receive notice of the district court's order dismissing the case. The Tenth Circuit found that "by proffering an excuse, the plaintiff appeared to recognize he had a timeliness problem" and therefore the court "liberally construe[d] the notice of appeal as a motion to reopen for appeal pursuant to Fed. R. App. P. 4(a)(6)." *Id.* at 454.

The Tenth Circuit has consistently applied this interpretation. In *United States v. Dodds*, 1994 U.S. App. LEXIS 33673 (10th Cir. 1994), the district court clerk sent the *pro se* plaintiff's copy of the order to the wrong address, resulting in an untimely appeal, as in the present case. In allowing the appeal, the court explained, "[b]ecause Defendant recognized that he had a timeliness problem, we liberally construe Defendant's notice of appeal as a motion to reopen the time for appeal pursuant to Rule 4(a)(6)." *Id.* at *3; *see also United States v. Muldrow*, No. 99-3357 (10th Cir. Apr. 13, 2000) ("Because Defendant recognizes he has a

timeliness problem, we liberally construe his notice of appeal as a motion under Fed. R. App. P. 4(a)(6).").[1]

When unpublished decisions and orders are taken into account, it emerges that several other circuits have construed untimely notices of appeal as Rule 4(a)(6) motions.

The First Circuit has directed a district court to treat a *pro se* plaintiff's untimely notice of appeal as a motion to reopen the time for appeal. *See Abreu v. United States*, 1999 U.S. Dist. LEXIS 2690, at *1 (D.R.I. Feb. 4, 1999) ("[I]n remanding this matter to the district court, the First Circuit intends that the *pro se* petitioner's notice of appeal be considered as a motion made pursuant to Fed. R. App. P. 4(a)(6).").

The Second Circuit has several times instructed district courts to construe a *pro se* plaintiff's untimely notice of appeal as a motion to reopen the time for appeal. In *Martinez v. Scully*, No. 94-2190 (2d Cir. May 6, 1994), the court of appeals remanded to the district court with instructions "to determine when petitioner received a copy of the judgment and to treat appellant's notice of appeal as a motion to extend the time for appeal under Fed. R. App. P. 4(a)(6)." *See Martinez v. Scully*, 1995 U.S. Dist. LEXIS 7430, at *1-*2 (S.D.N.Y. May 31, 1995) (quoting Second Circuit's order). Similarly, in *Powless v. Grose*, No. 96-2091 (2d Cir. Mar. 22, 1996), the court of appeals instructed the district court "to construe the appellant's notice of appeal as a motion to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6)." *See Powless v. Grose*, 1996 U.S. Dist.

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[1] The Tenth Circuit's order in *Muldrow* is reproduced at Pet. App. 37a-39a.

LEXIS 10694, at *2-*3 (N.D.N.Y. July 18, 1996) (noting Second Circuit's order).[2]

The Fourth Circuit has consistently held that where "a *pro se* appellant filed an untimely notice of appeal offering some excuse for untimeliness, that notice is properly construed as a motion to reopen the time to note an appeal under Fed. R. App. P. 4(a)(6)." *United States v. Akinkoye*, 16 Fed. Appx. 179, 180 (4th Cir. 2001). In *United States v. Blakely*, 97 Fed. Appx. 453, 454 (4th Cir. 2004), the would-be appellant, acting *pro se*, sought to appeal the denial of a motion but did not file the notice of appeal until after the allotted time. The Fourth Circuit allowed the appeal: "Blakely's *pro se* motion to extend and notice of appeal, in which she alleged that she did not timely receive notice of her action being dismissed, may be properly construed as a motion to reopen the time to note an appeal." *Id.* at *2. The court remanded to the district court with instructions to determine whether Blakely's notice met the requirements of 4(a)(6). In *Buckley v. Freund*, 22 Fed. Appx. 185, 186 (4th Cir. 2001), the court found that a motion titled "motion notice appeal," in which the appellant requested that his late appeal be accepted, qualified as a motion for extension "due to Buckley's expressed desire to pursue his appeal." The Fourth Circuit addressed this issue again recently in *United States v. Gray*, 2004 U.S. App. LEXIS 10077 (4th Cir. May 21, 2004). Gray sought to appeal a district court order denying relief on his motion filed under 28 U.S.C. § 2255. Gray's appeal was untimely, but since Gray stated in his notice of appeal that he did not receive notice of the order, the court "construe[d] Gray's statement as a motion to reopen the time to note an appeal under Fed. R. App. P. 4(a)(6)." *Id.* at *2.

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[2] The Second Circuit's orders in *Martinez* and *Powless* are reproduced at Pet. App. 33a-34a and Pet. App. 35a-35a, respectively.

Finally, the D.C. Circuit has cited the Eleventh Circuit's *Sanders* decision in a way that suggests a willingness to construe a notice of appeal as a Rule 4(a)(6) motion to reopen in an appropriate case. *See United States v. Feuver*, 236 F.3d 725, 728-29 & n.7 (D.C. Cir. 2001). The court did not have to decide the question, however, because it was impossible to construe the filing at issue in *Feuver*—a "Motion for Determination of Status" that did "not even mention the word 'appeal'"—as a motion to reopen. *Id.* at 729. *But cf. Kidd v. District of Columbia*, 206 F.3d 35, 38 (D.C. Cir. 2000) (noting that Rule 4(a)(6), like Rule 4(a)(5), "requires a motion asking the district court to reopen the time for appeal").

Although no other court of appeals has taken the Third Circuit's "harsh" position, the Ninth Circuit has held that Rule 4(a)(6) ordinarily requires "noticed motions," not "informal application[s]." *Nunley v. City of Los Angeles*, 52 F.3d 792, 795 (9th Cir. 1995). The court also held, however, that district courts have broad discretion to dispense with service requirements and the like, and accepted an *ex parte* application that failed to mention Rule 4(a)(6) as a motion to reopen, noting that "we will not rigidly deny . . . review under the authority of Rule 4(a)(6)." *Id.* at 794 n.4. Accordingly, it is not clear how the Ninth Circuit would answer the question presented today.

In sum, with the Third Circuit's decision in this case, the courts of appeals are now squarely divided over whether a *pro se* litigant's untimely notice of appeal may be construed as a motion to reopen.

II. THE DECISION BELOW MISCONSTRUES RULE 4(a)(6).

The Third Circuit's interpretation of Rule 4(a)(6) is mistaken.

First, the Rule's text shows that the Third Circuit was mistaken to require strictly parallel readings of the "motion" requirement in Rules 4(a)(5) and 4(a)(6). Rule 4(a)(5) is a general provision providing for the extension of the time to file a notice of appeal where the would-be appellant can show "excusable neglect or good cause." By its nature, a showing of excusable neglect or good cause requires some detail—more detail than appears in a notice of appeal. Rule 4(a)(6), by contrast, is a specific provision designed to address the situation in which a would-be appellant has filed a notice of appeal out of time because he or she did not receive notice within 21 days after entry of judgment. A showing of late receipt is much more straightforward than a showing of excusable neglect or good cause, and is the sort of a thing that a party can easily include in a notice of appeal, as the notices filed in this case and the cases discussed in Part I above illustrate. Indeed, the Ninth Circuit has held that a party seeking relief under Rule 4(a)(6) need only "specifically den[y] receipt of notice" to trigger the rule. *Nunley*, 52 F.3d at 796. Accordingly, it is reasonable to suppose, as courts in the First, Second, Fourth, Tenth, and Eleventh Circuits have, that a notice of appeal can satisfy the requirements of Rule 4(a)(6) without necessarily being able to satisfy the requirements of the more demanding Rule 4(a)(5).

Second, the Third Circuit's interpretation of Rule 4(a)(5) and 4(a)(6) as equally strict is fundamentally at odds with Rule 4(a)(6)'s purpose. As the Second Circuit has observed, "[t]he purpose of subdivision (6) [of Federal Rule of Appellate Procedure 4(a)] was to relieve parties of the rigors of subdivision (5) when the failure to timely appeal was caused by not having received notice of the entry of judgment." *Avolio v. County of Suffolk*, 29 F.3d 50, 53 (2d Cir. 1994). The Advisory Committee notes confirm this reading—Rule 4(a)(6) was added to the Appellate Rules in 1991, along with companion amendments to Federal Rule of Civil Procedure 77(d), "to permit district courts to *ease strict*

sanctions now imposed on appellants whose notices of appeal are filed late because of their failure to receive notice of entry of a judgment." Fed. R. Civ. P. 77 advisory committee's note (emphasis added). Given this history, it makes sense to conclude, as the majority of circuits to have considered the question have done, that Rule 4(a)(6) requires less in the way of formality than Rule 4(a)(5). By requiring the filing of a formal motion to extend the time for appeal, the decision below runs contrary to Rule 4(a)(6)'s purpose of relaxing Rule 4(a)(5)'s strictures and providing relief to parties who did not receive notice of entry of judgment.

Third, even if there were some reason to regard Rule 4(a)(5) and Rule 4(a)(6) as exactly alike, the better approach would be to treat appropriately worded *pro se* notices of appeal as motions under *both* provisions. That approach would accord with the well-recognized principle that a *pro se* plaintiff's pleadings are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (discussing the requirement to "[c]onstru[e] petitioner's inartful pleading liberally"). Indeed, the court below hinted at this outcome when it allowed that its "interpretation may lead to harsh results under both rules [4(a)(5) and 4(a)(6)], and *it may be that it would be preferable to treat a* pro se *notice of appeal as a motion under both rules.*" Pet. App. 11a (emphasis added).

Fourth, and relatedly, the Third Circuit's approach exalts form over substance. Samuel Poole's notice of appeal was unquestionably a plea to the court to accept the untimely appeal and consider the fact that he did not receive notice of entry of judgment until after the time to appeal had passed; the May 9, 2002 notice used underlining to draw attention to the fact that Poole had received notice of entry only three days earlier, on May 6. Pet. App. 40a. The only difference between Poole's notice of appeal and a motion satisfying the Third Circuit's standard is a caption at the top reading

"Motion to Reopen Under Rule 4(a)(6)." To deny anyone—let alone a *pro se* plaintiff—his day in the court of appeals based on such a slender distinction, and to do it in a case in which the would-be appellant filed late through no fault of his own, is the clearest sort of injustice.

Fifth, following the Third Circuit's approach would allow prison officials to block prisoners' access to the courts by ensuring that they do not receive notice of an adverse decision until after the time provided by Rule 4(a)(1). The Third Circuit dismissed this as an "extreme hypothetical," Pet. App. 11a, but in fact a variant of this "extreme hypothetical" led this Court to create a special rule for assessing the timeliness of a *pro* se prisoner's notice of appeal. In *Houston v. Lack*, 487 U.S. 266 (1988), this Court adopted a "mailbox rule" for determining when a *pro se* prisoner submits his notice of appeal. Under the mailbox rule, the notice is deemed filed at the moment the prisoner gives it to prison authorities for mailing. *See id.* at 276. Among other things, the Court was worried about the fact that a *pro se* prisoner has no choice but to entrust the sending and receipt of his mail to prison authorities, "whom he cannot control or supervise and who may have every incentive to delay." *Id.* at 271. This is essentially the same concern the Third Circuit dismissed as an extreme hypothetical; the only difference is that in *Houston v. Lack*, the concern was delay in getting mail from the prisoner to the postal service, whereas here the concern is delay in delivering mail from the postal service to the prisoner. If the one concern was serious enough to trouble this Court in 1988, the other ought to have been serious enough to trouble the Third Circuit in 2004.

III. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT MERITS IMMEDIATE REVIEW

This court's review is appropriate not only to remedy the erroneous decision below, but also to prevent unjust denial of access to the courts and maintain the uniformity of the Federal Rules of Appellate Procedure.

Access to the courts of appeals is a critically important issue. In this case, for example, petitioner is seeking to vindicate his constitutional right to associate with his son. Pet. App. 2a. The district court made an elementary error in acting *sua sponte*, before the complaint was even served, to deny Poole's claims against several parties for lack of personal jurisdiction and failure to file within the limitations period. Pet. App. 18a-21a. Both personal jurisdiction and statute of limitations are waivable affirmative defenses, and therefore cannot serve as grounds for a *sua sponte* dismissal before the parties have even been served. But Poole will have to live with this error, which sounds the death knell for his constitutional claim, if he cannot win a hearing from the court of appeals. If his claim had arisen anywhere in the First, Second, Fourth, Tenth, or Eleventh Circuits, however, he would have had his hearing and gotten his reversal. This is precisely the sort of inconsistency on a pressing matter that this Court should not tolerate.

In addition, the House Committee on the Judiciary recognized that "uniformity of appellate procedure is urgently needed" when it authorized this Court, in 1966, to prescribe rules governing procedure in the federal appellate courts. H.R. Rep. No. 89-2153 (1966), *reprinted in* 1966 U.S.C.C.A.N. 4171, 4173. Judge Albert B. Maris, in a letter to the Committee, urged that "it is very much in the public interest that uniformity of such procedure be achieved." *Id.* at 4175. The need for uniformity in appellate procedure has not diminished in the interim. On the contrary, as the

number of appeals continues to rise, the need for uniformity also rises. *See, e.g.* Analytical Services Office, Administrative Office of the U.S. Courts, Judicial Facts and Figures Table 1.3 (2003) (reporting that the number of appeals filed has increased from 3,899 in 1960 to 60,847 in 2003).[3]

The issue is also recurring one. As the Advisory Committee noted in 1991, by way of justifying Rule 4(a)(6) and the companion amendments to Federal Rule of Civil Procedure 77(d), "[f]ailure to receive notice may have increased in frequency with the growth in the caseload in the clerks' offices." Fed. R. Civ. P. 77 advisory committee's note. Consistent with this observation, petitioner was able to unearth a dozen decisions and orders discussing how to interpret late notices of appeal in cases like this one. It is likely, however, that those decisions represent just the tip of the iceberg, since orders remanding for further consideration under Rule 4(a)(6) will rarely be published. *See supra* at 3.

In the interest of uniform access to the federal courts of appeals for the many future litigants who will receive late notices from district courts, this Court should grant certiorari and resolve the circuit split.

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[3] Available online at http://www.uscourts.gov/judicialfactsfigures/contents.html.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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September 7, 2004

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2364

SAMUEL T. POOLE, Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(Dist. Court No. 01-cv-00297)
District Court Judge: Hon. Joseph J. Farnan, Jr.

Argued Dec. 2, 2003.

Before: SLOVITER, ALITO, and FRIEDMAN,* Circuit Judges

(Opinion Filed: May 13, 2004)

OPINION OF THE COURT

ALITO, Circuit Judge:

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* The Honorable Daniel M. Friedman, Senior Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

This is an appeal from an order of the District Court dismissing all of the claims asserted in the pro se complaint filed by Samuel T. Poole ("Poole"), an inmate. Poole's notice of appeal was not filed on time, apparently because of delay in receiving notice of the entry of the order dismissing his claims. Instead of moving to reopen the time to file an appeal under Rule 4(a)(6) of the Federal Rules of Appellate Procedure, Poole filed a notice of appeal shortly after finally receiving notice. We hold that we lack jurisdiction to entertain this appeal.

I.

This case concerns the paternity of a minor who Samuel T. Poole claims is his son. In 2001, Poole filed what he called a "Petition for a Writ of Habeas Corpus" against several public officials and private individuals, alleging that a series of actions taken in connection with two family law proceedings—one in Delaware and the other in Pennsylvania—violated his Fifth and Fourteenth Amendment rights by interfering with his access to his son. The District Court treated the case as an action filed under 42 U.S.C. § 1983 and permitted Poole to proceed *in forma pauperis*. The District Court then dismissed the claims against two defendants *sua sponte* for lack of personal jurisdiction, and the Court dismissed the claims against the remaining defendants as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

II.

A.

Before reaching the merits of this appeal, we are required to consider whether we have appellate jurisdiction. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The timeliness of an appeal is a mandatory jurisdictional prerequisite. *United States v. Robinson*, 361 U.S. 220 (1960). In a civil case, Rule 4(a)(1) of the Federal Rules of Appellate

Procedure generally requires a notice of appeal to be "filed with the district clerk within 30 days after the judgment or order appealed from is entered." In this case, the order dismissing Poole's complaint was entered on March 26, 2002, and Poole deposited his notice of appeal in his prison's internal mail system 44 days later. Under Appellate Rule 4(c)(1), Poole's notice of appeal is regarded as having been filed upon mailing, but because he did not mail the notice of appeal within 30 days after the relevant order was entered, he did not comply with Rule 4(a)(1).

B.

Poole argues that his notice of appeal should be regarded as having been filed on time because there was a delay in his receipt of notice from the district court clerk's office regarding the entry of the order of dismissal. This delay resulted from Poole's transfer from one correctional institution to another shortly before the order of dismissal was entered. When Poole made his initial filing and until some time in late March 2002, he was incarcerated in the Delaware Correctional Center in Smyrna, Delaware. When the District Court entered the order dismissing Poole's claims, the clerk of the court apparently sent notice to Poole and all of the other parties on that same day. The notice to Poole was mailed to the facility in Delaware, but by the time it arrived, Poole had been transferred to Pennsylvania's State Correctional Institution at Graterford. The Postal Service returned the notice to the clerk on April 24, 2002, at which time the clerk faxed an "address request" to the Delaware Department of Corrections. The clerk received Poole's new address on April 29 and then mailed a copy of the order to the correct address. Poole received the order on May 6 and mailed his notice of appeal three days later.

Poole argues that handwritten letters that he sent to the District Court and that were received on March 22 and April 1 should have alerted the clerk to his transfer. The first letter was described on the docket sheets as "Letter to Clerk of the

Court dated 3/21/02 by Samuel Poole RE: questions regarding Habeas Corpus." This letter bore Poole's address at the Delaware facility, and in the midst of a discussion of other matters, the letter stated: "I will be returning to P.A. 3-24-02 is my Max out date and then my detainer come up . . . ."

The second letter was described in the docket sheets as "Letter by Plaintiff, received 4/1/02, advising the Court he has no pen, paper, or ability to make telephone calls." This handwritten note in its entirety states:

> Samuel T. Poole BN 5599
> Box 244
> Graterford Pa 19426-0244
>
> To: Clerk
>
> It will take me a couple of weeks to get a pen or to make a phone call or to get some paper this is the only way I can contact you with a pencil
>
> Thank you
>
> Samuel T. Poole

By the time this letter was sent and received, the clerk had already mailed notice to Poole's Delaware address, and apparently because this letter did not state expressly that Poole's address had changed and did not request that the clerk change the address listed on the docket, the letter did not alert the clerk's office that the notice sent a few days earlier had been mailed to a facility where Poole was no longer housed.

Poole argues that his notice of appeal should be regarded as having been filed on time under the reasoning of *United States v. Grana,* 864 F.2d 312 (3d Cir. 1989). In *Grana,* a criminal case, we held that, "in computing the timeliness of

filings which are jurisdictional in nature, any delay by prison officials in transmitting notice of a final order or judgment to an incarcerated *pro se* litigant should be excluded from the computation." *Id.* at 313. In the present case, Poole complains about delay attributable to the clerk's office, not prison officials, but Poole argues that *Grana* stands for the broad proposition that "when official delay . . . interferes with receipt of the notice of appeal, that delay 'must be subtracted from calculation of time for appeal.'" Appellant's Br. at 1 (quoting *Grana,* 864 F.2d at 316).

Poole's argument overlooks the significance of the fact that *Grana* was a criminal case. Because the present case is civil, the approach that we took in *Grana* is foreclosed by Federal Rule of Civil Procedure 77(d) and Federal Rule of Appellate Procedure 4(a). Under Civil Rule 77(d), a district court clerk must notify all parties not in default "[i]mmediately upon the entry of an order or judgment." The Rule goes on to state, however, that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." Appellate Rule 4(a), in turn, provides a procedure for reopening the time to file a notice of appeal when the party desiring to appeal does not receive notice of the entry of the judgment or order. In a civil case, therefore, the only way in which a party may obtain relief based on a clerk's failure to serve notice of the entry of a judgment or order is via Appellate Rule 4(a), not via the *Grana* approach.

The *Grana* approach remains viable[2] in criminal cases because the Federal Rules of Criminal Procedure do not

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[2] *Grana* was decided before Appellate Rule 4(a)(6) was added and corresponding changes were made in Civil Rule 77(d). However, because these changes do not apply to criminal cases, *Grana* was not affected.

contain any provision analogous to Civil Rule 77(d) and because Appellate Rule 4(b), which deals with appeals in criminal cases, does not contain any provision analogous to Appellate Rule 4(a)(6).[3] However, the *Grana* approach cannot be used to extend the time for filing a notice of appeal in a civil case.[4]

C.

1.

The remaining question that we must consider is whether there is any way in which Poole can obtain relief under Appellate Rule 4(a)(6). That Rule states:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the motion is filed within

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[3] The absence of criminal analogs to Fed. R. Civ. P. 77(d) and Fed. R. App. P. 4(a)(6) is probably due to the fact that the vast majority of orders in criminal cases from which a defendant may take an appeal are judgments of conviction and sentence. A criminal defendant must be present when sentenced, and consequently there is no need for the district court clerk to notify the defendant by mail regarding this occurrence. For the same reason, there are not many instances in which a criminal defendant runs the risk of failing to file a timely notice of appeal due to lack of notice regarding the entry of the order from which the appeal is taken. *Grana* was one of the relatively unusual criminal cases in which a defendant took an appeal from an order other than a judgment of conviction and sentence.

[4] Moreover, even if Civil Rule 77(d) and Appellate Rule 4(a) did not preclude us from applying *Grana* in the civil context, we would be reluctant to extend *Grana* to a case such as the present one, where the delay was not primarily due to Poole's status as an inmate but to the simple fact that he was moved. Although Poole argues that his letter of April 1 should have alerted the district court clerk that he had been transferred, neither of his letters expressly informed the clerk of that fact or requested that his address be changed in the court's records. It is simply asking too much of the district court clerk to note that the address listed on the April 1 letter was different from the address that Poole had previously provided.

> 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party would be prejudiced.

The terms of Appellate Rule 4(a)(6) thus contemplate the filing of a motion to reopen within seven days after notice is received. Here, Poole concedes that he received notice on May 6, 2002. He thus had until May 13 to move to reopen, but instead of filing a motion to reopen, he simply filed a notice of appeal on May 9. Unless we can construe his notice of appeal as a motion to reopen, he cannot qualify for relief under Appellate Rule 4(a)(6).

2.

Our court has not decided whether a pro se notice of appeal may be construed as a motion to reopen under Appellate Rule 4(a)(6), but we have held that a notice of appeal cannot be construed as a motion to extend the time to appeal in a civil case under Appellate Rule 4(a)(5). *Herman v. Guardian Life Insurance Co.*, 762 F.2d 288 (3d Cir. 1985) (per curiam). In *Herman,* we noted that before Appellate Rule 4(a)(5) was amended in 1979, we had been "'generally willing to treat a tardy notice of appeal as the substantial equivalent of a motion to extend the time for filing on the ground of excusable neglect.'" *Id.* at 289 (citation omitted). We held, however, that the 1979 amendment prevented us from continuing that practice. We noted that the first sentence of Fed. R. App. P. 4(a)(5) permits a district court to extend the time to file a notice of appeal "upon motion," and we observed: "Thus, the filing of a motion is expressly required to obtain an extension of time." *Id.* We also noted that the Committee Notes on the 1979 amendment to this provision stated that "'[t]he proposed amendment would

make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time.'" *Id.* at 289-90 (quoting Appellate Rule 4(a)(5), Committee Notes, 1979 Amendments). We therefore held that an extension may not be granted under Appellate Rule 4(a)(5) unless a motion is filed.

Every other court of appeals to consider the question has reached the same conclusion. *See* 16A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, and Patrick J. Schiltz, Federal Practice and Procedure § 3950.3 at 139 & n.11 (1999 & 2003 Supp.) (citing cases). Not only are these decisions supported by the language of Appellate Rules 4(a)(5) and 4(a)(6) and their Committee Notes, but the contrast with the provision of the Appellate Rules governing an extension of time to file a notice of appeal in a criminal case is striking. Appellate Rule 4(b)(4) expressly states that in criminal cases an extension may be granted "with or without motion."

3.

The reasoning of *Herman* and like cases from other circuits militates in favor of a similar interpretation of Appellate Rule 4(a)(6). The critical language in the two rules is not materially distinguishable. Appellate Rule 4(a)(5) states in relevant part:

> The district court may extend the time to file a notice of appeal *if . . . a party so moves* no later than 30 days after the time proscribed by this Rule 4(a) expires . . . .

(emphasis added). Appellate Rule 4(a)(6) contains similar language:

> The district court may reopen the time to file an appeal . . . *if . . . the motion is filed* within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the

> entry . . . .

(emphasis added). Likewise, the Committee Notes for the two provisions are hard to distinguish in the respect relevant here. The Notes on the 1979 amendments to Rule 4(a)(5) state:

> The proposed amendment would make it clear that *a motion to extend the time must be filed* no later than 30 days after the expiration of the original appeal time . . . .

(emphasis added).

The Notes on the 1991 amendments to Rule 4(a)(6) state:

> *Reopening may be ordered only upon a motion* filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier.

(emphasis added).

Because the decision in *Herman* was based on language in Appellate Rule 4(a)(5) and its Committee Note that is not significantly different from language in Appellate Rule 4(a)(6) and its Committee Note, we conclude that we should apply *Herman* in the present context as well. We therefore hold that Appellate Rule 4(a)(6) requires a motion to reopen. While "no particular form of words is necessary to render a filing a 'motion,'" *Campos v. LeFebvre,* 825 F.2d 671, 676 (2d Cir. 1987), a simple notice of appeal does not suffice.

We are aware that the Eleventh Circuit reached a contrary result in *Sanders v. United States,* 113 F.3d 184 (11th Cir. 1997) (per curiam). While acknowledging the similarity between the language of Appellate Rules 4(a)(5) and (6), *see id.* at 187 n.5, the *Sanders* panel gave several reasons for

interpreting the rules differently, but we do not find these reasons persuasive.

In part, the *Sanders* panel seems to have been influenced by a belief that parties who move for an extension under Rule 4(a)(5) are (as a group) less blameless than those (as a group) who move to reopen the time to appeal under Rule 4(a)(6).[5] This assessment of the relative blamelessness of the two groups is hardly clear cut. Parties who seek extensions under Rule 4(a)(5) are sometimes entirely blameless—for example, those who fail to file on time because of "an act of God or unforeseen human intervention." *Pioneer Inv. Serv. Co. v. Brunswick Associates Ltd. P'ship,* 507 U.S. 380, 388-89 (1993) (discussing "excusable neglect" under a bankruptcy rule). And parties who fail to file a timely notice of appeal because they have not received notice of the relevant judgment or order may not be entirely blameless[6]—for example, the party who is informed by the court that a dispositive order is expected within a week but does not thereafter make any effort to find out whether the order has been issued. In any event, assuming that there is some difference in the relative blamelessness of the two groups, the difference is far too slight to justify divergent interpretations of the very similar language of Rules 4(a)(5) and 4(a)(6).

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[5] The Court stated that "when through no fault of his own, a pro se litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court." 113 F.3d at 187. The Court added that a "notice of appeal filed late because the appellant did not receive notice of the judgment should be treated differently (and more favorably) than those filed late for other reasons (i.e., those governed by Rule 4(a)(5)'s excusable neglect standard)." *Id.*

[6] Courts have faulted such parties for failing to make due inquiry about adverse judgments or orders. *See, e.g., O.P.M. Leasing Services Inc.*, 769 F.2d 911 (2d Cir. 1985) (party who was not served with notice under Civil Rule 77(d) faulted for not looking for notice of order in legal periodical).

The remaining reasons given in *Sanders* are likewise unconvincing. The *Sanders* Court stated that it had "a duty to liberally construe" a pro se litigant's submission, 113 F.3d at 187 (internal quotation and citation omitted), but this duty cannot justify taking a fundamentally different approach in interpreting filings under Rules 4(a)(5) and 4(a)(6).

Finally, we are not moved by the *Sanders* panel's argument that its interpretation of Rule 4(a)(6) is needed so that prison officials will not prevent inmates from taking timely appeals by ensuring that they do not receive notice of adverse decisions until after the time to appeal has expired. This argument is based on a hypothetical situation that is unlikely to arise with any frequency, if at all—namely, a case in which (a) prison officials risk the consequences of obstructing court mail in order to prevent a prisoner from appealing a district court decision that the prisoner has lost, (b) the prisoner learns of the decision within 180 days, but (c) instead of moving to reopen the time to appeal, the prisoner simply files a notice of appeal. We will not permit our interpretation of Rule 4(a)(6) to be governed by such an extreme hypothetical. If at some time in the future we are presented with such an outrageous case, we are confident that we have the tools to ensure that the right to appeal is not defeated.

In conclusion, we hold that relief under both Appellate Rules 4(a)(5) and 4(a)(6) requires the filing of a motion, not just a notice of appeal. We understand that this interpretation may lead to harsh results under both rules, and it may be that it would be preferable to treat a pro se notice of appeal as a motion under both rules. But we believe that Appellate Rules 4(a)(5) and 4(a)(6) must be read consistently, and thus we conclude that Rule 4(a)(6) demands a motion.

III.

Because Poole's Notice of Appeal was not timely filed and Poole failed to move to reopen the time to file an appeal, we lack jurisdiction to decide the merits of his appeal. Therefore, for the reasons set out above, this appeal is dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAMUEL T. POOLE, Plaintiff,	:	
v.	:	Civil Action No.01-297-JJF
FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, AND JOHN DOE, Defendants.	:	

MEMORANDUM ORDER

Plaintiff, Samuel T. Poole, is a *pro se* litigant who is presently incarcerated at the Delaware Correctional Center ("DCC") located in Smyrna, Delaware. His SBI number is 337607. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.

I. STANDARD OF REVIEW

Reviewing complaints filed pursuant to 28 U.S.C. § 1915 is a two step process. First, the Court must determine whether Plaintiff is eligible for pauper status. The Plaintiff filed this action on May 4 , 2001. The Court granted

Plaintiff leave to proceed *in forma pauperis* on June 5, 2001 and ordered him to pay $10.95 as an initial partial filing fee within thirty days. Plaintiff paid the initial partial filing fee on June 12, 2001.

Once the pauper determination is made, the Court must then determine whether the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).[1] If the Court finds Plaintiff's Compliant falls under any one of the exclusions listed in the statutes, then the Court must dismiss the Complaint.

When reviewing complaints pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1), the Court must apply the standard of review set forth in Fed. R. Civ. P. 12(b)(6). *See Neal v. Pennsylvania Bd. of Probation and Parole*, No. 96-7923, 1997 WL 338838 (E.D. Pa. June 19, 1997) (applying Rule 12(b)(6) standard as appropriate standard for dismissing claim under § 1915A). Accordingly, the Court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." *Nami v. Fauver,* 82 F.3d 63, 65 (3d Cir. 1996). *Pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 106

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[1] These two statutes work in conjunction. Section 1915(e)(2)(B) authorizes the court to dismiss an *in forma pauperis* complaint at any time, if the Court finds the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. Section 1915A(a) requires the Court to screen prisoner *in forma pauperis* complaints seeking redress from governmental entities, officers or employees before docketing, if feasible and to dismiss those complaints falling under the categories listed in § 1915A(b)(1).

(1976) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

The standard for determining whether an action is frivolous is well established. The Supreme Court has explained that a complaint is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).[2] As discussed below, Plaintiff's claims have no arguable basis in law or in fact and shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

II. BACKGROUND

1. Plaintiff's Pending Motions

Along with the Complaint, Plaintiff has filed the following five–motions: 1) Motion for Appointment of Counsel (D.I. 2); 2) Motion for Discovery and Inspection (D.I. 3); 3) Motion for Temporary Restraining Order (D.I. 21); 4) Motion to Compel Discovery (D.I. 23); and 5) Motion for Default (D.I. 28). Because the Court finds that the Plaintiff's claims frivolous, Plaintiff's Motion for Appointment of Counsel, Motion for Discovery and Inspection, Motion for Temporary Restraining Order and Motion to Compel Discovery shall be denied as moot.

Furthermore, judgment by default is appropriate when the party against whom the judgment is sought has "failed to plead or otherwise defend" against the complaint as provided by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 55(a). Because Plaintiff filed the Complaint pursuant to 28

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[2] *Neitzke* applied § 1915(d) prior to the enactment of the Prisoner Litigation Reform Act of 1995 (PLRA). Section 1915(e)(2)(B) is the re-designation of the former § 1915(d) under the PLRA. Therefore, cases addressing the meaning of frivolousness under the prior section remain applicable. *See* § 804 of the PLRA, Pub. L. No. 14-134, 110 Stat. 1321 (April 26, 1996).

U.S.C. § 1915, service of process must be made by the United States Marshal, as directed by the Court. *See* Fed. R. Civ. P. 4(c)(2). The Court has not yet directed the United States Marshal to serve the Complaint in this case. Consequently, the Defendants have not "failed to plead or otherwise defend" against the Complaint. Therefore, Plaintiff's Motion for Default shall be denied.[3]

2. Plaintiff's "Motion to Supplement"

Plaintiff initially filed this complaint naming "John Doe" as one of the Defendants. On January 30, 2002, Plaintiff filed a "Motion to Supplement the Complaint" (D.I. 25) in which he identified Defendant "John Doe" as Loretta M. Young and expanded upon his claims. Under Fed. R. Civ. P. 15(a) a plaintiff may amend his complaint once as a matter of course at any time before a responsive pleading is served. As this case has not been served on the Defendants, the Court construes the "Motion to Supplement the Complaint" simply as Plaintiff's Amended Complaint. The Clerk shall amend the docket, replacing "John Doe" with Loretta M. Young. An amended complaint filed as a matter of course or after leave of the court supercedes the original complaint. *See Young v. City of Mount Ranier*, 238 F.3d 567 (4th Cir. 2001) (quoting *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000)); *Hal Roach Studios, Inc. v. Richard Feiner, & Co. Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1990); *Fritz v. Standard Sec. Life Ins. Co. of New York*, 676 F.2d 1356, 1358 (11th Cir. 1982); Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed 1990). ("A pleading that has been amended ... Supersedes the pleading it modifies ... Once an amended pleading is interposed, the original pleading no

[3] Plaintiff served the Motion for Default on Defendant Nails on February 2, 2002 and Kathleen N. Miller has entered an appearance on Defendant Nails' behalf. The Court shall direct the Clerk to mail a copy of the Memorandum Order to Defendant Nails' counsel.

longer performs any function in the case . . .''). Consequently, the Court reviews only the Amended Complaint filed on January 30, 2002.

III. DISCUSSION

Although the Plaintiff attempts to set out his claims in chronological order, the Amended Complaint often does not make sense. Nonetheless, the Court has attempted to sort out Plaintiff's claims.[4] First, Plaintiff alleges that sometime in 1996, Defendant Young presided over a paternity suit involving the minor child Samuel J. Poole ("Samuel") born on December 7, 1995. (D.I. 25 at 9) Plaintiff alleges that he is Samuel's biological father and that his name appeared on Samuel's birth certificate. (*Id.* at 2) Plaintiff further alleges that at this hearing, defendants Young and Hayes pressured Sherrilyn Connor, ("Connor"), Samuel's mother, into naming Norman Hayes as Samuel's biological father. Plaintiff further alleges that Young then entered an order amending Samuel's birth certificate. Plaintiff appears to be alleging that the hearing was held in violation of his rights under the Fourteenth Amendment, as he was not notified and given an opportunity to respond. (*Id.*)

Second, Plaintiff appears to be alleging that sometime in 1999 Defendant Emma Hayes ("Hayes") obtained a custody order from a Pennsylvania court in violation of Plaintiff's rights. (*Id.* at 3) Furthermore, Plaintiff alleges Defendant Hayes obtained this order in a conspiracy with Defendant Wright, who appears to be a Master appointed by the Delaware County Court of Common Pleas. (*Id.* at 3) Plaintiff further alleges that Connor contested this custody order and had it amended. (*Id.* at 4) Plaintiff contends that

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[4] Plaintiff has named the Family Court of New Castle County, the Delaware County Bar Association and John Doe as defendants in his complaint. However, the Court has not discerned any specific allegations against these defendants.

Connor was again forced to name Norman Hayes as Samuel's biological father. (*Id.*)

Third, Plaintiff alleges that Defendant Hayes now has custody of Samuel, although it is not clear when or how Hayes obtained custody. (*Id.* at 5-6) Plaintiff further alleges that Hayes is harming Samuel, by giving him a "controlled substance." (*Id.*) Plaintiff provides no other information in support of this allegation. Next, Plaintiff seems to be alleging that Defendant Zetusky, who appears to be a judge on the Delaware County Court of Common Pleas, awarded Defendant Hayes custody of Samuel, thus violating Plaintiff's constitutional rights. (*Id.* at 17)

Finally, Plaintiff alleges that Defendants Nails and Redavid provided ineffective assistance of counsel to Plaintiff, his mother and Connors, in their attempts to maintain custody of Samuel. (*Id.* at 14-16) Plaintiff requests that he be awarded unspecified compensatory and punitive damages from each Defendant. (*Id.* 9-17)

B. Analysis

1. Personal Jurisdiction

Both Defendants Wright and Zetusky appear to be employed by the Delaware County Court of Common Pleas and residents of the Commonwealth of Pennsylvania. In order to assert personal jurisdiction over out of state defendants, the Court must engage in a two step analysis. First, the Court must decide whether the State of Delaware long arm statute authorizes the Court to assert jurisdiction over these defendants. Second, the Court must determine whether exercising jurisdiction comports with the requirements of the Due Process Clause of the Fourteenth Amendment. *See Steelman v. Carper*, 124 F. Supp. 2d 219, 222 (D. Del. 2000) (citing *Compaq Computer Corp. v. Packard Bell Elec. Inc.*, 948 F. Supp. 338, 342 (D. Del. 1996)).

It appears that the visitation and custody determinations allegedly made by Defendants Wright and Zetusky occurred outside the State of Delaware. Plaintiff has not alleged that either of these defendants "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from its services or things used or consumed in the State." Del. C. Ann. tit. 10 § 3104(c)(4). Nor has Plaintiff established that Defendants Wright and Zetusky have sufficient "minimum contacts" with the State of Delaware to meet the "traditional notions of fair play and substantial justice" the Due Process Clause of the Fourteenth Amendment requires when a court exercises personal jurisdiction over an out of state resident. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1948). Consequently, Plaintiff's claims against Defendants Wright and Zetusky shall be dismissed for lack of personal jurisdiction.

2. Statute of Limitations

Plaintiff's Fourteenth Amendment claim against Defendant Young and his conspiracy claim against Defendant Hayes are time-barred by the statute of limitations. The Supreme Court has determined that § 1983 claims should be characterized as personal injury actions for statute of limitations purposes. *See Wilson v. Garcia*, 471 U.S. 261 (1985). "Limitations periods in § 1983 suits are to be determined by reference to the to the appropriate 'state statute of limitations and the coordinate tolling rules.'" *Hardin v. Straub*, 490 U.S. 536, 541 (1989) (citing *Board of Regents of Univ. of New York v. Tomanio*, 446 U.S. 478, 484 (1980)). However, accrual of such claims are governed by federal law. *See Albright v. Oliver*, 510 U.S. 266, 280 n. 6 (1994) (Ginsburg, J. concurring). The relevant state statute of limitations for a personal injury action in Delaware is two years. *See Del. Code Ann.* tit. 10 § 8119; *Carr v. Town of Dewey Beach*, 730 F. Supp. 591 (D. Del. 1990).

Consequently, Plaintiff's claim against Defendants Young and Hayes accrued, when he knew or had reason to know of the injury that forms the basis of each claim. *Carr*, 730 F. Supp. at 601. It appears that Plaintiff knew the outcome of the paternity hearing in 1996. Even if Plaintiff did not know the outcome of the paternity hearing in 1996, he knew of it by at least April 21, 1999, the date Defendant Wright awarded visitation to Hayes. Plaintiff did not file this action until May 3, 2001, more than two years after the latest date his claim could have accrued.

Because the statute of limitations is an affirmative defense ordinarily subject to waiver, *sua sponte* dismissal on this ground raises concerns of procedural fairness. However, prior to the enactment of the PLRA, several federal courts concluded that *in forma pauperis* claims which were time-barred were properly dismissed *sua sponte* as frivolous under 28 U.S.C. § 1915(d). *See e.g. Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993) ("Where it is clear from the face of the complaint filed *in forma pauperis* that the claims asserted are barred by the applicable statute of limitations, those claims are properly dismissed pursuant to § 1915(d)"); *Myers v. Vogal*, 960 F.2d 750, 751 (8th Cir. 1992) ("Although the statute of limitation is an affirmative defense, a district court may properly dismiss an *in forma pauperis* complaint under 28 U.S.C. § 1915(d) when it is apparent the statute of limitations has run.") (*per curiam*); *Street v. Vose*, 936 F.2d 38, 39 (1st Cir. 1991) (*per curiam*); *Clark v. Georgia Pardons and Paroles Bd.*, 915 F.2d 636, 640 n.2 (11th Cir. 1990).

With the enactment of the PLRA, § 1915(e) not only retained the language of the former § 1915(d), it also added new provisions requiring the dismissal of *in forma pauperis* actions "at any time" if the district court finds the claims to be "frivolous, malicious, or for failure to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B). Thus, the *sua sponte* dismissal of clearly time-barred claims

is not only appropriate, but required under the PLRA. *See Johnstone v. United States*, 980 F. Supp. 148, 154 (E.D. Pa. 1997) ("When a complaint on its face shows that the action was filed outside of the applicable limitations period, and the court has satisfied itself that no legal rule tolls or otherwise abrogates the limitations period, *sua sponte* dismissal is appropriate under § 1915."). It is clear from the face of the complaint, that Plaintiff's claims against Defendants Young and Hayes were filed outside the two year limitations period and "no legal rule tolls or otherwise abrogates the limitations period." *Id.* Plaintiff's claims against Defendants Young and Hayes have no arguable basis in law or in fact. Therefore, Plaintiff's claims against Defendants Young and Hayes shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

3. State Action Required in § 1983 Actions

Plaintiff's claims against Defendants Nails and Redavid also fail. To state a claim under 42 U.S.C. § 1983, Plaintiff must allege "the violation of a right secured by the Constitution or laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (overruled in part on other grounds *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)). To act under "color of state law" a Defendant must be "clothed with the authority of state law." *West*, 487 U.S. at 49. It is clear from the Complaint that Defendants Nails and Redavid are both attorneys engaged in the private practice of law. It appears that at some point in time, each Defendant was hired to represent either Plaintiff, Connor or Plaintiff's mother in their custody dispute with Hayes. Neither of these defendants have acted under "color of state law." Plaintiff's claims against defendants Nails and Redavid have no arguable basis in law or in fact. Therefore, Plaintiff's claims against these

Defendants shall be dismissed as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

NOW THEREFORE, at Wilmington this 26 day of March, 2002, IT IS HEREBY ORDERED that:

1. The Clerk of the Court shall amend docket by removing "John Doe" and adding Loretta M. Young as a defendant.

2. Plaintiff's claims against Defendants Wright and Zetusky are DISMISSED for lack of personal jurisdiction.

3. Plaintiff's claims against Defendants Young and Hayes are DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

4. Plaintiff's claims against Defendants Nails and Redavid are DISMISSED as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1).

5. Plaintiff's Motion for Appointment of Counsel (D.I. 2) is DENIED as moot.

6. Plaintiff's Motion for Discovery and Injunction (D.I. 3) is DENIED as moot.

7. Plaintiff's Motion for Temporary Restraining Order (D.I. 21) is DENIED as moot.

8. Plaintiff's Motion to Compel Discovery (D.I. 23) is DENIED as moot.

9. Plaintiff's Motion for Default (D.I. 28) is DENIED.

10. The Clerk of the Court shall mail a copy of this Memorandum Order forthwith to the Plaintiff and Kathleen Miller.

/s/ Joseph J. Farnan, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-2364

SAMUEL T. POOLE,

Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and FRIEDMAN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court en banc, the petition for rehearing is denied. Judge Friedman would have granted panel rehearing.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: June 8, 2004
tyw/cc: Charles R.A. Morse, Esq.
Stuart B. Drowos, Esq.
Kathleen M. Miller, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-2364

SAMUEL T. POOLE,

Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

AMENDED ORDER
SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, *Circuit Judges* and FRIEDMAN*, *Senior Circuit Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other

---

* As to panel rehearing only.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: June 15, 2004
tyw/cc: Charles R.A. Morse, Esq.
Stuart B. Drowos, Esq.
Kathleen M. Miller, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

02-2364

SAMUEL T. POOLE,

Appellant

v.

FAMILY COURT OF NEW CASTLE COUNTY; JOHN DOE; EMMA HAYES; FLORENCE F. WRIGHT, ESQ.; JOHN W. NAILS, ESQ.; EDWARD J. ZETUSKY, Jr.; WALTER T. REDAVID, ESQ., Judge; DELAWARE COUNTY BAR ASSOCIATION; ROBERT SNYDER, Warden; ATTORNEY GENERAL OF THE STATE OF DELAWARE; LORETTA M. YOUNG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(Dist. Court No. 01-cv-00297)
District Court Judge: Hon. Joseph J. Farnan, Jr.

Argued: December 2, 2003

Before: SLOVITER, ALITO, and FRIEDMAN,*
Circuit Judges

JUDGMENT

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* The Honorable Daniel M. Friedman, Senior Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

This cause came to be heard on the record from the United Sates District Court for the District of Delaware and was argued on December 2, 2003.

On consideration whereof, it is not here ordered and adjudged by this Court that the appeal of the order of the District Court entered on March 26, 2001, be and the same is DISMISSED for lack of jurisdiction. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: May 13, 2004

Certified as a true copy and issued in lieu
of a formal mandate on 6/16/04

Teste: /s/ Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

FEDERAL RULES OF APPELLATE PROCEDURE RULE 4, 28 U.S.C. APPENDIX

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of

Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

S.D.N.Y.
91-cv-5774
Leisure, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May one thousand nine hundred and ninety-four,

Julio Martinez, Petitioner-Appellant, v. Charles Scully, Superintendent of Green Haven Correctional Facility; Robert Abrams, New York State Attorney General; and Robert M. Morgenthau, District Attorney, New York County, Respondents-Appellees.	United States Court of Appeals Second Circuit Filed May 6, 1994 George Lange III, Clerk 94-2190

A notice of appeal having been filed by appellant on February 4, 1994, it is ordered that this case be remanded to the United States District Court for the Southern District of New York (Leisure, J.) to determine when petitioner received a copy of the judgment and to treat appellant's

notice of appeal as a motion to extend the time for appeal under Fed. R. App. Proc. 4(a)(6).

/s/ J. Edward Lumbard per FXA

/s/ Francis X. Altimari

/s/ John M. Walker
Circuit Judges

FXA JEL JMW

May 6, 1994

MANDATE

N.D.N.Y.
95-cv-1575
Pooler, J.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
APRIL 1, 1996

GEORGE A. RAY, Clerk
UTICA

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of March one thousand nine hundred and ninety-six,

Donald N. Powless, Plaintiff-Appellant, v. James G. Grose, et al., Defendants-Appellees.	United States Court of Appeals Second Circuit Filed March 22, 1996 George Lange III, Clerk 96-2091

This Court having determined *sua sponte* that it lacks jurisdiction over this appeal because the notice of appeal is untimely pursuant to Rule 4(a)(1) of the Federal Rules of

Appellate Procedure, it is ordered that said appeal be and it hereby is dismissed. The district court is instructed to construe the appellant's notice of appeal as a motion to reopen the time for appeal pursuant to Fed. R. App. P. 4(a)(6).

/s/ Richard J. Cardmone (per JMW)

/s/ John M. Walker

/s/ Joseph L. McLaughlin (per JMW)
Circuit Judges

A TRUE COPY
GEORGE LANGE III, CLERK

/s/ George Lange III

JMW RJC JMcL

Mandate Issued: March 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
APRIL 17, 2000
RALPH L. DeLOACH, Clerk
By /s/ _____ Deputy

	92-20063-01
UNITED STATES OF AMERICA,	
	No. 99-3357
Plaintiff-Appellee,	
	A true copy
v.	
	Patrick Fisher Clerk, U.S. Court of
LEALON MULDROW,	Appeals, Tenth Circuit
Defendants-Appellant.	/s/ _____ Clerk

ORDER

Filed April 13, 2000

Before **BRORBY, KELLY,** and **HENRY**, Circuit Judges.

Defendant Lealon Muldrow, a federal prisoner, appeals the district court order entered June 17, 1998 denying his 28 U.S.C. § 2255 motion.

This appeal is jurisdictionally defective. Under Fed. R. App. P. 4(a)(1)(B), the sixty-day deadline for the filing of a

timely notice of appeal expired on Monday, August 17, 1998. *See* Fed. R. App. P. 26(a). The certificate of service attached to Defendant's notice of appeal contains a date of October 22, 1999. Pursuant to the prisoner mailbox rule, *see* Fed. R. App. 4(c); *Houston v. Lack*, 487 U.S. 266, 275-76 (1988), the notice of appeal is deemed filed as of October 22, 1999, which is approximately fourteen months after expiration of the sixty-day filing deadline.

Defendant argues that the sixty-day deadline for filing his appeal did not begin to run until October 20, 1999, the date he claims he received a copy of the district court order entered June 17, 1998. This argument was considered and rejected in *Jenkins v. Burtzloff*, 69 F.3d 460 (10th. Cir. 1995). In *Jenkins*, this court held that the time period for filing an appeal begins to run on the date of entry of the order, and not the date the prisoner first receives a copy of the order. *Id.* at 461. Compliance with filing requirements is mandatory and jurisdictional. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988). Defendant's appeal is untimely, and this court lacks appellate jurisdiction.

Defendant states in his notice of appeal that he did not know the district court had entered an order denying his § 2255 motion until October 13, 1999 when he called the district court clerk's office. He further states that he received a copy of the order on October 20, 1999. Plaintiff United States of America in its jurisdictional memorandum brief states that "the district court's docket sheet lends some credibility to [Defendant's] claim" that he did not receive a copy of the district court order denying his § 2255 motion until October 20, 1999. The court appreciates Plaintiff's candor.

Defendant Muldrow's situation may fall within the scope of Fed. R. App. P. 4(a)(6). *See generally Avolio v. County of Suffolk*, 29 F.3d 50, 51-54 (2nd Cir. 1994) (sets forth scope and application of Rule 4(a)(6)). Because Defendant recognizes he has a timeliness problem, we liberally construe

his notice of appeal as a motion under Fed. R. App. P. 4(a)(6). *See Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The appeal is DISMISSED for lack of jurisdiction. The case is REMANDED to the district court for a determination of whether the time period for filing a notice of appeal should be reopened for fourteen days pursuant to Fed. R. App. P. 4(a)(6). The mandate will issue forthwith.

Entered for the Court,
Patrick Fisher, Clerk

IN THE UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

SAMUEL T. POOLE, Appellant	:	CIVIL ACTION
	:	Civil Action
V.	:	No. 01-297-JJF
FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, and JOHN DOE, Defendants	:	

NOTICE OF APPEAL

Notice is hereby given that Samuel T. Poole, Petitioner/Appellant in the above-entitled matter, does appeal to the United States Court Of Appeals For The Third Circuit from the ORDER of Judge Joseph J. Farnan, Jr., entered in this action on March 26, 2002 (which Petitioner/Appellant came into receipt of dated May 6, 2002).

Respectfully submitted,

By: /s/ Samuel T. Poole
Samuel T. Poole BN-5599
SCI-Graterford
Box 244
Graterford, PA. 19426-0246
Petitioner/Appellant pro se

DATED: May 9, 2002

Supreme Court, U.S.
FILED
DEC 2 - 2004
OFFICE OF THE CLERK

No. 04-318

In The Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, and JOHN DOE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

LAURENCE V. CRONIN
(*Counsel of Record*)
KATHLEEN M. MILLER
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800 Delaware Avenue
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Counsel for John W. Nails

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OR CALL COLLECT (402) 342-2831

STATEMENT OF QUESTION PRESENTED

Should Federal Rule of Appellate Procedure 4(a)(6) be applied consistently with Federal Rule of Appellate Procedure 4(a)(5), which requires a motion to be filed to obtain relief from an untimely appeal.

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BRIEF IN OPPOSITION

This is John W. Nails' response in opposition to Mr. Poole's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in *Poole* v. *Family Court of New Castle County, et al.*, 368 F.3d 263 (3d Cir. 2004).

FEDERAL RULE OF APPELLATE PROCEDURE AT ISSUE

The central issue in this case concerns the application of Rule 4(a) of the Federal Rules of Appellate Procedure, which is reproduced in Mr. Poole's Appendix (herein after "App."), pages 29a-32a.

PRELIMINARY STATEMENT

Mr. Poole attempts to paint this case as a picture of injustice cast upon *pro se* prisoners. However, the fact that Mr. Poole is a *pro se* inmate, has no bearing on the heart of the matter. Mr. Poole finds himself in the position he is in purely out of his own making. When Mr. Poole was moved from a prison facility in Delaware to a prison in Pennsylvania, he did not advise the court of his change of address. Had he done so, he would have timely received notice of the District Court's decision dismissing his action and he could have timely appealed. Instead, after the clerk tracked down his new address, he received notice of the decision after the 30 day appeal period. Rather than filing a motion to reopen the time to file an appeal, as required by the rule, Mr. Poole simply filed a notice of appeal. The Third Circuit held that the rule requires the filing of a

motion and that his bare notice of appeal was not sufficient. Accordingly, in a well reasoned opinion, the Third Circuit properly dismissed his appeal as being untimely. Mr. Poole, still trying desperately to keep his case alive, has filed a Petition for Writ of Certiorari. For the reasons set forth below, the petition should be denied.

STATEMENT OF THE CASE

Background Facts

At the time Mr. Poole filed his "Petition for Writ of Habeas Corpus" (hereinafter "Petition") in the United States District Court for the District of Delaware, he was a *pro se* litigant incarcerated in the Delaware Correctional Institute in Smyrna, Delaware. *Poole*, 368 F.3d at 265. The District Court construed Mr. Poole's filing as an action under 42 U.S.C. § 1983. The District Court dismissed the action *sua sponte* on grounds of lack of personal jurisdiction and frivolousness pursuant to 28 U.S.C. §§ 1915(e)(2)(B)-1915A(b)(1). *Id.* at 264. The District Court entered the order dismissing the case on March 26, 2002 and mailed the decision to all parties, including Mr. Poole at the Delaware facility. *Id.* at 264-265.

In late March, 2002, Mr. Poole was transferred from Delaware to a Pennsylvania State Correctional Institution in Graterford. *Poole*, 368 F.3d at 265. He wrote a letter to the District Court, which was received on March 22, 2002. *Id.* That letter, which bore Mr. Poole's address at the Delaware facility, stated among other things, "'I will be returning to P.A. 3-24-02 is my Max out date and then my detainer come up. . . .'" *Id.* Apparently, this was some

cryptic reference to the fact that he would be moving to Pennsylvania.

Mr. Poole sent another letter to the District Court, which was received on April 1, 2002, which provided in its entirety:

> Samuel T. Poole BN5599
> Box 244
> Graterford Pa 19426-0244
>
> To: Clerk
>
> It will take me a couple of weeks to get a pen or to make a phone call or to get some paper this is the only way I can contact you with a pencil
>
> Thank you
>
> Samuel T. Poole

Poole, 368 F.3d at 265. Although the letter contained Mr. Poole's new address, he failed to advise the clerk of his transfer to the facility in Pennsylvania or that he had a new address.

On April 24, 2002, the Postal Service returned to the District Court the order mailed to Mr. Poole's Delaware address, as undeliverable. *Poole*, 368 F.3d at 265. In response, the court clerk faxed a request to the Delaware Department of Corrections seeking Mr. Poole's new address, which the clerk received on April 29, 2002. *Id.* The clerk then mailed a second copy of the court's order to Mr. Poole at his address in Pennsylvania. Mr. Poole received this second copy on May 6, 2002, and mailed his notice of

appeal to the District Court on May 9, 2002 – 44 days after entry of the Court's order dismissing the case.[1]

The Third Circuit's Decision

The Third Circuit dismissed Mr. Poole's appeal on May 13, 2004, after determining that it was without jurisdiction to entertain the appeal because Mr. Poole failed to file a notice of appeal within 30 days of the entry of judgment, the deadline mandated by Appellate Rule 4(a)(1)(A). *Poole*, 368 F.3d at 266-67. The Third Circuit correctly held that a timely notice of appeal is a "mandatory jurisdictional prerequisite," and that Mr. Poole's untimely notice of appeal prevented it from considering the merits of his appeal. *Id.* at 264 (citing *United States* v. *Robinson*, 361 U.S. 220, 224, 80 S. Ct. 282, 4 L.Ed.2d 259 (1960)).

The Third Circuit rejected Mr. Poole's argument that the rule stated in the Third Circuit's decision in *United States* v. *Grana*, 864 F.2d 312 (3d Cir. 1989), should apply to this case. In *Grana*, the Third Circuit held that, "'in computing the timeliness of filings which are jurisdictional in nature, any delay by prison officials in transmitting notice of a final order or judgment to an incarcerated *pro se* litigant, should be excluded from the computation.'" *Id.* at 313. Mr. Poole complained that the time delay, which he attributed to the clerk's office, should be subtracted from his time to appeal. *Poole*, 368 F.3d at 265. The Third Circuit, however, declined to extend the approach of *Grana* (a criminal case) to Mr. Poole's case (a civil action) because

[1] Based on this Court's opinion in *Houston* v. *Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L.Ed.2d 245 (1988), Mr. Poole's notice of appeal was deemed filed when he delivered it to prison authorities to mail.

Federal Rule of Civil Procedure 77(d) and Federal Rule of Appellate Procedure (hereinafter "Appellate Rule") 4(a) prevented the application of *Grana* to a civil action. *Id.* at 265-66. Federal Rule of Civil Procedure 77(d) provides that lack of notice of entry of an order by the clerk does not affect the time to appeal or authorize the court to relieve a party for failure to timely appeal, except as permitted in Appellate Rule 4(a). Thus, Mr. Poole's attempt to blame the clerk's office for his untimely appeal did not help him because Federal Rule of Civil Procedure 77(d) expressly provides that lack of notice is not grounds to extend the time to appeal. Mr. Poole's only chance to save his appeal from dismissal was if he satisfied the requirements of Appellate Rule 4(a)(6).

The Third Circuit analyzed whether Mr. Poole could obtain relief under Appellate Rule 4(a)(6). Based on the language of the rule, the Third Circuit found that a litigant must file a motion to invoke the relief provided by the rule. Mr. Poole did not, however, file such a motion. Rather, he "simply filed a notice of appeal." *Poole*, 368 F.3d at 267. Therefore, unless the notice of appeal could be construed as a motion, Mr. Poole's appeal would be dismissed as being untimely.

The Third Circuit had not previously addressed this issue under Appellate Rule 4(a)(6), however, it had a previous occasion to address the issue under Appellate Rule 4(a)(5). In *Herman* v. *Guardian Life Ins. Co. of America,* 762 F.2d 288 (3d Cir. 1985), the Third Circuit addressed the question of whether a late notice of appeal could be construed as a motion under Appellate Rule 4(a)(5). The *Herman* court noted that prior to the 1979 amendment to Appellate Rule 4(a)(5), the court was generally willing to allow a late notice of appeal to be the

substantial equivalent of a motion to extend time based on excusable neglect. *Herman*, 762 F.2d at 289. The amended rule, however, expressly provides that an extension of time may be granted "'upon motion'" thereby precluding the prior practice. *Id.* The *Herman* court also noted that the Committee Notes on the 1979 amendment state that the amendment would make clear "'that a *motion* to extend the time must be filed no later than 30 days after the expiration of the original appeal time.'" *Id.* (emphasis added) Accordingly, the Third Circuit held in *Herman* that relief may not be granted under Appellate Rule 4(a)(5) unless a motion is filed. *Id.* The Third Circuit noted in its May 13 decision in *Poole*, that every other circuit court of appeals which addressed this question under Appellate Rule 4(a)(5) has reached the same conclusion. *Poole*, 368 F.3d at 267.

In *Poole*, the Third Circuit compared Appellate Rule 4(a)(5) with 4(a)(6). The Third Circuit noted that the language of the rules were not materially different and the Committee Notes were very similar as well. Accordingly, the Third Circuit applied the reasoning of *Herman* to Appellate Rule 4(a)(6) and held that the rule requires the filing of a motion. While the Third Circuit recognized that "'no particular form of words is necessary to render a filing a 'motion', a simple notice of appeal'", which was what Mr. Poole filed, "does not suffice." *Poole*, 368 F.3d at 268 (citation omitted).

The Third Circuit recognized that its holding is in conflict with the Eleventh Circuit's decision in *Sanders* v. *United States*, 113 F.3d 184 (11th Cir. 1997), where the court allowed an untimely notice of appeal to be construed as a motion under Appellate Rule 4(a)(6). *Poole*, 368 F.3d at 268. The Third Circuit, however, found the Eleventh

Circuit's grounds for ignoring the language of the rule and departing from the reasoning applied to Appellate Rule 4(a)(5), unpersuasive. *Id.* at 269. Accordingly, Mr. Poole's appeal was dismissed as untimely.

ARGUMENT

I. ONLY THE THIRD AND ELEVENTH CIRCUITS HAVE EXPRESSLY ADDRESSED THE ISSUE OF INTERPRETING APPELLATE RULE 4(a)(5) AND 4(a)(6) CONSISTENTLY AND THUS, THE EXTENT OF THE CONFLICT IS OVERSTATED BY MR. POOLE.

The conflict on the issue presented in this case is limited to the Third Circuit's decision in *Poole* v. *Family Court of New Castle County*, 368 F.3d 263 (3d Cir. 2004) and the Eleventh Circuit's opinion in *Sanders* v. *United States of America*, 113 F.3d 184 (11th Cir. 1997). When thoroughly vetted, the actual split is far less pervasive, and far less established, than the split described by Mr. Poole. In fact, a review of the decisions pointed to by Mr. Poole reveals that no other circuit court has passed on the specific question presented, namely whether Appellate Rule 4(a)(5) and 4(a)(6) must be interpreted consistently regarding whether a motion must be filed to obtain relief under the rule.[2]

[2] As discussed below, in a recent order, the D.C. Circuit appears to require the filing of a motion under Appellate Rule 4(a)(5) and 4(a)(6). *See Global Index, Inc.* v. *Mkapa*, No. 04-7016, 2004 WL 1368856 (D.C. Cir. Jun. 17, 2004).

In *Poole*, the Third Circuit ruled that it could not construe an untimely notice of appeal as a motion under Appellate Rule 4(a)(6). The Third Circuit reached its conclusion after carefully comparing similar language contained in Appellate Rule 4(a)(5) and 4(a)(6) and their corresponding Committee Notes. The Court reasoned that the amendments to Appellate Rule 4(a)(5) and 4(a)(6) prevented the Court from allowing a notice of appeal to be construed as a motion.

In *Sanders*, the would-be appellant, Mr. Sanders, attempted to appeal by filing an untimely notice of appeal of a judgment entered against him on June 19, 1996. *Sanders*, 113 F.3d at 185-186. Mr. Sander's notice of appeal was deemed filed on August 28, 1996, which was nearly ten days after the deadline to file an appeal. *Id.* The Eleventh Circuit, however, construed the notice of appeal as a motion under Rule 4(a)(6). In determining that the notice of appeal should be construed as a motion, the court referenced its prior decisions refusing to construe an untimely notice of appeal as a motion under Rule 4(a)(5), but held that a different approach was appropriate under Rule 4(a)(6). Thus, the Eleventh Circuit held that an untimely notice of appeal can be construed as a motion under Appellate Rule 4(a)(6). *Id.* at 187.

Mr. Poole attempts to paint a picture of an extensive split among the circuits. However, the Third and Eleventh Circuit decisions is the entire extent of the split, as no other circuit courts have directly faced the issue of whether the language of Appellate Rule 4(a)(6), should be construed consistently with Appellate Rule 4(a)(5), which requires the filing of a motion to invoke its provisions. The cases cited by Mr. Poole from other circuits do not address the issue.

Mr. Poole places considerable emphasis on case law in the Tenth Circuit, namely *Ogden* v. *San Juan County*, 32 F.3d 452 (10th Cir. 1994). *See* Petition at 9. In that decision, however, the Tenth Circuit was actually reviewing a district court's decision in which it had refused to reopen the time to appeal. In laying out the procedural background of the case, the Tenth Circuit simply noted its prior order which remanded the case to the district court with instructions to construe the untimely notice of appeal as a motion under Appellate Rule 4(a)(6). *Ogden*, 32 F.3d at 454. The Tenth Circuits's prior order contained no discussion of the requirements of Appellate Rule 4(a)(6), let alone an analysis of whether such an instruction was consistent with the rule. Similarly, in *United States* v. *Dodds*, 42 F.3d 1407, 1994 WL 673056 (10th Cir. 1994) which Mr. Poole points to despite its non-precedential designation, the court's brief order contains no analysis of the requirements of Appellate Rule 4(a)(6). Furthermore, the order in *United States* v. *Muldrow*, No. 99-3357 (10th Cir. Apr. 13, 2000), contains no analysis whatsoever. Accordingly, the Tenth Circuit has not considered whether Appellate Rule 4(a)(5) and 4(a)(6) should be read consistently.

A review of the remainder of the cases cited by Mr. Poole demonstrates that none have analyzed the requirements of Appellate Rule 4(a)(6) or whether allowing a notice of appeal to be construed as a motion under that subsection, is appropriate given the consistent reading of Appellate Rule 4(a)(5) by the circuit courts.[3] *See, e.g.*,

[3] *See, Poole*, 368 F.2d at 267 ("Every other court of appeals to consider the question [under Appellate Rule 4(a)(5)] has reached the same conclusion.")

Abreu v. *United States*, No. 97-686L, 1999 WL 143098 (D.R.I. Feb. 4, 1999) (the magistrate's report stated "*Apparently*, in remanding this matter to the district court, the First Circuit intends that the *pro se* petitioner's notice of appeal be considered as a motion made pursuant to Fed. R. App. P. 4(a)(6)." (emphasis added); *Martinez* v. *Scully*, No. 91 Civ. 5774, 1995 WL 326479 (S.D.N.Y. May 31, 1995) (district court noting Second Circuit's direction to treat notice of appeal as a motion, without discussion of issue); *Powless* v. *Gross*, No. 95-CV-1575, 1996 WL 421195 (N.D.N.Y. July 18, 1996) (same); *United States* v. *Akinkoye*, 16 Fed. Appx. 179 (4th Cir. 2001) (per curiam opinion summarily remanding case to district court to construe an untimely notice of appeal as a Rule 4(a)(6) motion without analysis of the issue); *United States* v. *Gray*, 98 Fed. Appx. 239 (4th Cir. 2004) (per curiam opinion remanding case, without discussion of requirements of the rule, ordering that the late notice of appeal be construed as a motion under Appellate Rule 4(a)(6)).

Two of the cases cited by Mr. Poole do not stand for the proposition that a notice of appeal should be construed as a motion, as Mr. Poole suggests. In *United States* v. *Blakely*, 97 Fed. Appx. 453 (4th Cir. 2004), in a per curiam opinion summarily remanding case to district court, the Fourth Circuit instructed the lower court to construe the motion to extend time, which was filed along with a notice of appeal, as a motion under Rule 4(a)(6), merely based on the timing of the filing of the motion. In *Buckley* v. *Freund*, 22 Fed. Appx. 185 (4th Cir. 2001), in a per curiam opinion, although the appellant failed to file a notice of appeal, he timely filed a motion for extension of time to file an appeal, which the court directed the district court to treat as a Rule 4(a)(5) or 4(a)(6) motion.

Finally, Mr. Poole cites *United States* v. *Feuver*, 236 F.3d 725 (D.C. Cir. 2001) for the proposition that the D.C. Circuit appears willing to accept a notice of appeal as a motion. However, the D.C. Circuit in a per curiam order in *Global Index, Inc.* v. *Mkapa*, No. 04-7016, 2004 WL 1368856 (D.C. Cir. June 17, 2004), stated that Fed. R. App. P. 4(a)(6) requires the filing of a motion, not just a notice of appeal.

II. THE THIRD CIRCUIT CORRECTLY RULED THAT APPELLATE RULE 4(a)(6) REQUIRES THE FILING OF A MOTION TO OBTAIN RELIEF UNDER THE RULE.

The Third Circuit correctly ruled that Appellate Rule 4(a)(6) requires the filing of a motion and that a bare notice of appeal will not suffice to obtain relief under the rule. *Poole*, 368 F.3d at 268. The Third Circuit began its analysis with the rule itself, which provides:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) *the motion is filed* within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier; (B) the court finds that the moving party was entitled to notice of the entry of judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and (C) the court finds that no party will be prejudiced.

Poole, 368 F.3d at 266; Fed. R. App. P. 4(a)(6) (emphasis added). Thus, the language of the rule leaves no room for

argument – a party must file a motion to seek relief under the rule. The Third Circuit so held, and then considered whether it could construe an untimely *pro se* notice of appeal as a motion to reopen. *Poole*, 368 F.3d at 267.

The Court began this analysis with its decision in *Herman* v. *Guardian Life Ins. Co. of America*, 762 F.2d 288 (3d Cir. 1985), in which it was faced with the question of whether a notice of appeal could be construed as a motion under Appellate Rule 4(a)(5). *Poole*, 368 F.3d at 267. In *Herman*, the court noted that the 1979 amendment to the rule precluded the Court's prior practice of allowing a late notice of appeal to be the substantial equivalent of a motion to extend time for excusable neglect. *Id.* This ruling was based on the express language of the rule, which states that the time to file an appeal may be extended "'upon motion'". *Id.* Thus, the filing of a motion is expressly required by the rule. *Id.* The *Herman* court also looked to the Committee Notes to the 1979 amendment to Appellate Rule 4(a)(5), which provide "'[t]he proposed amendment would make it clear that a *motion* to extend the time must first be filed no later than 30 days after the expiration of the original appeal time.'" *Id.* (emphasis added). Thus, based on the language of the rule and the Committee Notes, the *Herman* court held that an extension of time under 4(a)(5) could not be granted unless a motion was filed. *Id.* Every circuit court of appeals which has addressed this issue has reached the same conclusion. *Id.*

The Third Circuit in *Poole* applied the reasoning of *Herman* to Appellate Rule 4(a)(6) because the language of the two provisions are "not materially distinguishable." *Poole*, 368 F.3d at 267. Similarly, "the Committee Notes for the two provisions are hard to distinguish in the respect

relevant here." *Id. Compare*, 1979 Committee Notes for Appellate Rule 4(a)(5) (" . . . *a motion to extend the time must be filed* no later than . . .) *with* 1991 Committee Notes for Rule 4(a)(6) (*"Reopening may be ordered only upon a motion* filed within 180 days . . .). FED. R. APP. P. 4, Advisory Committee Notes; *Poole*, 368 F.3d at 268-269 (emphasis added). Therefore, the Third Circuit held that Appellate Rule 4(a)(6) must be read consistently with Rule 4(a)(5), which requires the filing of a motion. *Poole*, 368 F.3d at 268-269.

The Third Circuit's interpretation of Rule 4(a)(6) is bolstered by the language of Rule 4(b), the criminal counterpart of Rule 4(a). In fact, Rule 4(b) plainly demands the more lenient treatment sought in this case by Mr. Poole, but only applies this leniency to criminal appeals. Rule 4(b)(4) allows a court to extend the time for an appeal "with or without motion and notice." It would have been a simple matter indeed to insert this very clause into Rule 4(a)(6) if the rule's drafters intended the interpretation advanced by Mr. Poole.

The Third Circuit recognized that its decision is at odds with the Eleventh Circuit's decision in *Sanders*, but found the reasoning of *Sanders* unpersuasive. The Third Circuit rejected the Eleventh Circuit's apparent perception that a party that moves under Rule 4(a)(5) is less blameless than a party that moves under Rule 4(a)(6). *Poole*, 368 F.3d at 268. The Third Circuit then gave examples of where a litigant would be blameless in the context of an application under Rule 4(a)(5) and where a litigant is not blameless in the context of an application under Rule 4(a)(6). Thus, there is no logical basis for the Eleventh Circuit's belief that one class of applicants should be treated more favorably than the other.

Next, the Third Circuit rejected the notion that the duty to construe *pro se* pleadings liberally is a basis for "taking a fundamentally different approach" in interpreting Appellate Rule 4(a)(5) and 4(a)(6). *Poole*, 368 F.3d at 268-69. The Eleventh Circuit gave no reason for taking such a fundamentally different approach, nor is there any in the rule.

Finally, the Third Circuit rejected the Eleventh Circuit's unfounded concern that without applying its interpretation of Appellate Rule 4(a)(6), prison officials could prevent an inmate from taking an appeal by ensuring that they do not receive adverse decisions until after the time to appeal has expired. *Poole*, 368 F.3d at 269. The Third Circuit stated that the Eleventh Circuit's hypothetical situation is unlikely to arise and if it did, the Court could use its tools to craft an appropriate remedy. *Id*. The Third Circuit correctly ruled that the interpretation of the rule should not be guided by an "extreme hypothetical." *Id*. Thus, the Third Circuit properly rejected the Eleventh Circuit's grounds for not applying Rule 4(a)(6) consistently with Rule 4(a)(5).

Mr. Poole argues that the Third Circuit is mistaken in viewing Rule 4(a)(5) and 4(a)(6) in the same manner. His arguments, however, have no basis in the rule and therefore, are without merit.

First, Mr. Poole claims that Appellate Rule 4(a)(5) and 4(a)(6) should be read differently because, he perceives Appellate Rule 4(a)(5) to be more general and thus, a request under that rule would require more detail and Appellate Rule 4(a)(6) is specific and therefore more straightforward. Petition at 13. As such, Mr. Poole goes on to state, a request for relief under Appellate Rule 4(a)(6)

can easily be included in a notice of appeal. *Id.* However, the issue here is not whether the grounds for a motion under either section can be included in a notice of appeal. The issue is whether or not a motion is required. Appellate Rule 4(a)(5) and 4(a)(6), which are "not materially different," both expressly require the filing of a motion. Not only does Mr. Poole's argument make no sense based on the express language of the rule, it makes no sense as a practical matter. A litigant can just as easily add language to a notice of appeal which seeks relief under Appellate Rule 4(a)(5). For example, the litigant could simply state that a fire burned down his building preventing him from timely filing an appeal. *See Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 387-88, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) ("an act of God or unforseeable human intervention" may constitute excusable neglect.)

Mr. Poole next argues that the Third Circuits' interpretation of Appellate Rule 4(a)(6) defeats the purpose of the rule, which is to relieve a party of the rigors of Appellate Rule 4(a)(5). Petition at 14. Therefore, Mr. Poole asserts that Appellate Rule 4(a)(6) requires less formality. *Id.* Again, there is no basis for Mr. Poole's distinction given the language of the rule. While there may be different standards that apply on the merits of a motion under the two provisions, the standard for invoking the provisions is the same. A motion is expressly required. Put simply, although Mr. Poole can use semantic tools to discern a less "formal" intent from otherwise clear language in Appellate Rule 4(a)(6), the language of the Rule itself rejects the position taken by Mr. Poole.

Realizing that there is no basis for a distinction in interpretation of the two provisions, Mr. Poole argues that "appropriately worded *pro se* notices of appeal" should be

construed as a motion under both Rule 4(a)(5) and 4(a)(6). Petition at 14. Mr. Poole bases his argument on the proposition that *pro se* litigant's pleadings should be construed liberally. *Id.* Not only is such a result contrary to the consistent interpretation of Appellate Rule 4(a)(5), *see, e.g.*, *Cohen* v. *Empire Blue Cross & Blue Shield*, 142 F.3d 116, 118 n.1 (2d Cir. 1998) (refusing to treat a notice of appeal as a motion for extension of time under Appellate Rule 4(a)(5)); *Wilder* v. *Chairman of the Cent. Classification Bd.*, 926 F.2d 367, 371-72 (4th Cir. 1991) (same); *Senjuro* v. *Murray*, 943 F.2d 36, 37 (10th Cir. 1991) (same); *United States* v. *O'Leary*, 788 F.2d 1238, 1239-40 (7th Cir. 1986) (same); *Parker* v. *Strickland*, 728 F.2d 1406 (11th Cir. 1984) (same), it would make the plain language of the rule meaningless. Mr. Poole would have the court read out of the rule the requirement of filing a motion. Moreover, construing a notice of appeal as a motion for an extension of time would create confusion. As explained by the United States District Court for the Southern District of New York:

> As a matter of policy, it would be unwise to construe [notices of appeal] as motions. Doing so would open the door to a floodgate of litigation over whether ministerial papers that are routinely filed in the Clerk's office – documents that are ordinarily of no concern to judges, and that may not even be forwarded to chambers – should be parsed to see if circumstances warrant transforming them into sub silentio applications for relief from some procedural defect that cannot be cured. Both this Court and the Court of Appeals have recognized that *pro se* litigants must comply with the Federal Rules of Civil and Appellate Procedure, as well as with various technical requirements, such as filing deadlines and statutes

> of limitations, with which they ordinary might not be familiar. While *pro se* litigants are entitled to some leeway in pleading, stretching the concept of a "motion" to encompass papers that are manifestly not motions in order to redress perceived inequities is more leeway than this Court is prepared to give.

Knickerbocker v. *Artuz*, 198 F. Supp. 2d 415, 418 (S.D.N.Y. 2002). This important distinction lead the Third Circuit to observe "[w]hile 'no particular form of words is necessary to render a filing a "motion,"' . . . a simple notice of appeal does not suffice." *Poole*, 368 F.3d at 268 (citing *Campos* v. *LeFevre*, 825 F.2d 671, 676 (2d Cir. 1987)). For the same reasons, this is not, as Mr. Poole suggests, form over substance.

Finally, Mr. Poole argues that if the Third Circuit's approach is followed, prison officials would be allowed to block prisoners' access to the courts by ensuring that they do not receive notice of a judgment until after the time provided in Appellate Rule 4(a)(1). Petition at 15. First, the Third Circuit ruled that to obtain relief under Appellate Rule 4(a)(6), a motion must be filed and that a bare notice of appeal is not sufficient. *Poole*, 368 F.3d at 268. Had Mr. Poole simply filed a motion with his notice of appeal, he would not be in the situation he finds himself.[4] Thus, even if prison officials delayed the delivery of notice of a judgment, the prisoner would still have the ability to

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[4] Had Mr. Poole filed a motion under Appellate Rule 4(a)(6), the lower court would have considered the merits of his motion. Mr. Nails asserts that such a motion would have been denied because the reason Mr. Poole was late in filing his notice of appeal was due to his own failure to advise the court of his change of address. *See Poole*, 368 F.3d at 266 n.4.

obtain relief available to him under Appellate Rule 4(a)(6) if he simply files a motion. Second, the Third Circuit's decision does not allow prison officials to block prisoner access to the courts. If prison officials desire to ensure that a prisoner does not receive a pleading in order to block his access to the court, all the officials would have to do is wait until after the 180 days provided in Rule 4(a)(6), has expired. The Third Circuit's ruling has no impact on such behavior. Third, this situation is not at all similar to that in *Houston* v. *Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L.Ed.2d 245 (1988), as Mr. Poole suggests. The Court *Houston* held that the time of filing of a prisoner's notice of appeal is when the pleading is deposited with the prison authorities for delivery to court. *Houston*, 487 U.S. at 269-70. The Court based its decision on two grounds. First, unlike here, the rules[5] are not dispositive on this point. *Id.* at 273. Second, a *pro se* prisoner has no choice but to use the prison mailing system, over which he has no control. *Id.* The mailbox rule adopted by the Court makes the determination as to when the pleading was filed straightforward, rather than an uncertain one. *Id.* Here, the rules expressly provide that a motion is required. Moreover, the delay in Mr. Poole receiving notice of the court's order, was not out of his control. Finally, as discussed above, if the approach suggested by Mr. Poole is adopted, confusion and a flood of litigation would ensue.

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[5] The Court in *Houston* turned to Appellate Rules 3(a) and 4(a)(1) for guidance.

III. THE DECISION BELOW INVOLVES NEITHER AN IMPORTANT ISSUE NOR A RECURRING QUESTION.

Although the issues presented in this matter certainly may be important to litigants who disregard appellate jurisdictional requirements and decline the opportunity to seek the relief available to them under the ruling, but otherwise they do not have great practical importance or significant national implications for all federal appellants. *See* Supreme Court Rule 10(c). Rather, the issues presented will impact only a minuscule population of federal court litigants. This fact can be made no more apparent than by pointing to the 7 year gap between published circuit court opinions thoroughly discussing the rule in this context. There is, accordingly, no basis for this Court's discretionary review of this case based on the grounds set forth in Rule 10.

To the extent Mr. Poole argues that the result sanctioned by the Third Circuit is "unjust," this Court has recognized that appellate filing deadlines can produce harsh results, but that enforcement of deadlines is nonetheless required. *See United States* v. *Locke*, 471 U.S. 84, 101, 105 S. Ct. 1785, 85 L.Ed.2d 64 (1985). Moreover, Mr. Poole is not being arbitrarily "denied access" to the courts of appeal. He simply failed to take advantage of the opportunity to seek review in the Third Circuit – fault that he cannot place with any individual or entity except himself.

CONCLUSION

For the forgoing reasons, Mr. Nails respectfully requests that the Court refuse to exercise its discretionary authority under Supreme Court Rule 10 and deny Mr. Poole's application for a Writ of Certiorari.

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No. 04-318

Supreme Court, U.S.
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In The
Supreme Court of the United States

SAMUEL T. POOLE,

Petitioner,

v.

FAMILY COURT OF NEW CASTLE COUNTY, LORETTA M. YOUNG, EMMA HAYES, FLORENCE F. WRIGHT, JOHN W. NAILS, EDWARD J. ZETUSKY, JR., WALTER T. REDAVID, DELAWARE COUNTY BAR ASSOCIATION, and JOHN DOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

The Attorney General of the State of Delaware, on behalf of Respondents, Family Court of New Castle County, Delaware and Master Loretta Young of Family Court of New Castle County, Delaware respectfully requests this Honorable Court to deny the petition seeking review of the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware is unreported. (Pet.App. 13a-22a). The opinion of the Third Circuit Court of Appeals is reported at 368 F.3d 263 (3d Cir.2004). (Pet.App. 1a-12a). The Third Circuit's first order denying the petition for rehearing and rehearing *en banc* appears at Pet.App. 23a-24a. The amended order denying the petition for rehearing and rehearing *en banc* appears at Pet.App. 25a-26a.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 13, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner is a prison inmate who was incarcerated at the Delaware Correctional Center, Smyrna, Delaware

when he commenced this litigation. Although filed as a writ of habeas corpus, the Delaware District Court construed Petitioner's complaint as filed pursuant to 42 U.S.C. §1983. Petitioner's Complaint was later dismissed on March 26, 2002, pursuant to 28 U.S.C. §1915(e)(2)(B)-1915A(b)(1) for being legally frivolous. The Petitioner subsequently appealed to the Third Circuit which dismissed the appeal for being untimely filed; and therefore, the Court lacked jurisdiction.

Petitioner concedes he filed a notice of appeal 44 days after the entry of judgment; however, he attributes the delay to the Clerk of the District Court rather than to his own dilatory actions. Federal Rule of Civil Procedure 77(d) specifically provides: "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. . . . " F.R.Civ.P.77(d).

> It is neither feasible nor legally required that the clerks of the district courts undertake independently to maintain current addresses on all parties to pending actions. It is incumbent upon litigants to inform the clerk of address changes, for it is manifest that communications between the clerk and the parties or their counsel will be conducted principally by mail. In addition to keeping the clerk informed of any change of address, parties are obliged to make timely status inquiries. Address changes normally would be reflected by those inquiries if made in writing.

Fields v. Keating, 1998 WL 146398 (N.D.N.Y.) (quoting *Perkins v. King*, No. 84-3310, slip op. at 4 (5th Cir.1985)). Petitioner's appeal should have been dismissed on the basis of Fed.R.Civ.P.77(d) alone.

Petitioner claims that the Third Circuit should have construed his notice of appeal as a motion to re-open the time for filing an appeal because the petitioner met the Fed.R.App.P.4(a)(6) requirements. To support his thesis, the Petitioner cites to several cases in other circuits, specifically the Eleventh Circuit case of *Sanders v. United States*, 113 F.3d 184 (11th Cir.1997) (per curiam). In granting the motion in *Sanders* to construe a notice of appeal as a motion to re-open, the Court concluded that Rule 4(a)(6) motions should be treated differently or more liberally than Rule 4(a)(5) motions; otherwise, *Sanders*, a *pro se* prisoner, could be denied access to the courts through no fault of his own. *Id. Sanders* further states that the Court has a duty to "liberally construe [a *pro se* litigant's] assertions to discern whether jurisdiction to consider his motion can be founded on a legally justifiable base." *Sanders*, at 187, citing, *Fernandez v. United* States, 941 F.2d 1488, 1491 (11th Cir.1991); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (noting that *pro se* pleadings should be held "to less stringent standards than formal pleadings by lawyers"). Lastly, *Sanders* claims that prison officials could block a prisoner's access to court by delaying giving the prisoner the judgment order until the appeal time had expired. ("As defendants in a *pro se* prisoner's civil rights action, prison officials may have every incentive to delay, and, even if he suspects delay by prison authorities, the *pro se* prisoner is helpless to investigate or prove such dilatoriness.") quoting *Houston v. Lack*, 487 U.S. 266, 271 (1988). The Third Circuit did not find *Sanders'* reasoning persuasive.

REASONS FOR DECLINING REVIEW

Third Circuit's Decision

The timely filing of a notice of appeal is mandatory and jurisdictional. *Browder v. Director, Illinois Dept. of Corrections,* 434 U.S. 247 (1978). Pursuant to Fed.R.App.P.4(a)(1), a notice of appeal in a civil suit is required to be filed within thirty days of the entry of judgment.

The Court of Appeals for the Third Circuit has not decided whether a district court may construe a notice of appeal as a Rule 4(a)(6) motion to re-open the time for appeal, but has refused to construe a notice of appeal as a Rule 4(a)(5) motion reasoning that Rule 4(a)(5) expressly requires the filing of a motion. *Herman v. Guardian Life Ins. Co.,* 762 F.2d 288, 289-90 (3d Cir.1985).

Prior to the 1979 amendment to Rule 4(a)(5) many courts including the Third Circuit had treated an untimely notice of appeal as a motion for extension of the time if the notice was filed within the thirty day grace period. *Id.* at 289. However, since the 1979 amendments, this is no longer feasible in civil cases. In such actions, courts are not permitted to treat, as a motion for an extension, a bare notice of appeal, even one from a *pro se* litigant that is filed outside the time provided in Rule 4(a)(1) but within the 30 day grace period. *See Campos v. LeFevre,* 825 F.2d 671, 676 (2d Cir.1987). A "motion to appeal" was a mere notice of appeal that, standing alone, could not be construed as a motion for extension of appeal time. *Wilder v. Chairman of Central Classification Bd.,* 926 F.2d 367, 371 (4th Cir.), *cert. denied,* 502 U.S. 832 (1991).

Rule 4(a)(5) as amended, however, specifically conditions extension of the time in which a notice must be filed upon the filing of a motion within thirty days after the expiration of the initial thirty day filing period. Rule 4(a)(5) as amended, prohibits consideration of excusable neglect or good cause where an appellant fails to file a timely *motion* requesting an extension of time. (emphasis added). A late notice of appeal which fails to allege excusable neglect or good cause can no longer be construed as a motion for an extension of time. *Myers v. Stephenson,* 748 F.2d 202 (4th Cir.1984); *Campbell v. White*, 721 F.2d 644 (8th Cir.1983); *Wyzik v. Employee Benefit Plan of Crane Co.,* 663 F.2d 348 (1st Cir.1981); *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir.1980). *See also* 9 Moore's Federal Practice ¶204.13[2] at 4-104 (2d ed.1985) (result of failure to file timely notice followed by failure to make a timely motion extinguishes the right to appeal beyond revival). The Third Circuit after reviewing the Committee Notes to the 1979 Amendments and case law held that an extension may not be granted under Appellate Rule 4(a)(5) unless a motion is filed meaning "if a party so moves."

Consistent with this reasoning, the Third Circuit holds a similar interpretation of Rule 4(a)(6) as this rule contains similar language to Rule 4(a)(5). According to Rule 4(a)(6)'s relevant part, the district court may reopen the time to file an appeal for a period of 14 days . . . but only if all the following conditions are satisfied . . . the motion is filed within 180 days after the judgment or order. . . . Rule 4(a)(6). Rule 4(a)(5) and Rule 49(a)(6) both require motions according to the rules as well as the Committee Notes. The careful balancing of interests revealed by the text of Rule 4(a)(6) and the Committee

Note is a compelling reason for adherence to the language of the rule. *Marcangelo v. Boardwalk Regency*, 47 F.3d 88,91 (3d Cir.1995). When a procedural rule uses the precise phrase employed by the Advisory Committee, it can reasonably be inferred that the phrase means the same thing in both contexts. The Third Circuit's decision below does not misconstrue Rule 4(a)(6). The Third Circuit concluded that because the decision in *Herman* was based on language in Appellate Rule 4(a)(5) and its Committee Note which is not significantly different from language in Appellate Rule 4(a)(6) and its Committee Note, *Herman* should be applied in Petitioner's case as well. The Third Circuit, therefore, held that Appellate Rules 4(a)(5) and 4(a)(6) must be read consistently, and thus concluded that Rule 4(a)(6) demands a motion. Admittedly, the decision of the Third Circuit does conflict with decisions of other circuits; however, the construction and effect given to these rules by the Third Circuit are consistent with the Committee Notes.

Petitioner's *Pro Se* Status

When through no fault of his own, a *pro se* litigant does not receive notice of the order from which he seeks to appeal, it would be unjust to deprive him of the opportunity to present his claim to this court. *Sanders*, 113 F.3d at 187. In the case at bar, however, the Petitioner is not without fault. As Petitioner's brief explains, he informed the district court on March 22, 2002, that he would be returning to Pennsylvania, that his Delaware release date being March 24, 2002. (App. 4a). Thus, as early as March 22, 2002, Petitioner knew that he was going to have a change of address but did not provide it to the court. The entry of judgment was issued on March 26, 2002, and was

sent to the only address the district court had on record which was in Delaware. On April 1, 2002, the Petitioner again wrote a letter informing the court that it would take "a couple of weeks to get a pen or to make a phone call or to get some paper. . . ." (App. 4a). At the top of the page is a Pennsylvania address; however, the letter does not state that the address is a new address, nor does the letter request the clerk's office to forward any notices to the address on the letter. As previously stated, it is not the duty of the clerk's office to check each correspondence it receives to see if the address is different than the address on any previous correspondence. Although requirements of technical pleading and conformity with procedural rules should be viewed liberally when a litigant is acting *pro se,* the rules are not suspended simply because the litigant is unrepresented by counsel. The *pro se* litigant must exercise reasonableness and good faith in prosecution of his claims. *Carter v. Three Unknown Police Officers,* 112 F.R.D. 48, 52 (D.Del.1986). It was entirely reasonable for the Petitioner in his April 1, 2002, letter to the district court to acknowledge his transfer to Pennsylvania and in doing so specifically inform the court of his new address. The court was informed of Petitioner's new address on April 29, 2002, a month after his release and transfer to Pennsylvania. The resultant delay in receipt by Petitioner of the March 26th ruling was attributable solely to Petitioner's action or, more appropriately, inaction. The Third Circuit concluded that although the *Sanders* Court determined that it had a duty to liberally construe a *pro se* litigant's submission, this duty cannot justify taking a fundamentally different approach in interpreting filings under Rules 4(a)(5) and 4(a)(6).

Denial of Access to the Court

"As defendants in a *pro se* prisoner's civil rights action, prison officials 'may have every incentive to delay,' and, even if he suspects delay by prison authorities, the *pro se* prisoner is helpless to investigate or prove such dilatoriness." *See Houston v. Lack,* 487 U.S. 266, 271-72, (1988). The Third Circuit was not moved by this argument in *Sanders* regarding its interpretation of Rule 4(a)(6). (App. 11a). Petitioner claims "the Third Circuit's approach would allow prison officials to block prisoners' access to the courts by ensuring that they do not receive notice of an adverse decision until after the time provided by Rule 4(a)(1)." As the Third Circuit stated, this argument is based on a hypothetical situation that is unlikely to arise with any frequency – if at all. (App. 11a). Correctional personnel have too many responsibilities, such as maintaining prison security, to monitor daily mail containing numerous court decisions, orders, docket sheets, letters, etc., arriving at prison facilities. Legal mail is opened in the presence of the inmate and then only to confirm that it is legal mail; it is not read by personnel. Furthermore, if correctional personnel did engage in obstruction of prisoners' legal mail they risk termination from employment and possibly a prisoner lawsuit. The Third Circuit rightfully stated that it would not permit its interpretation of Rule 4(a)(6) to be governed by such an extreme hypothetical as put forth by *Sanders.*

Petitioner urges that the writ should be granted to resolve conflicting decisions regarding the interpretation of Fed.R.App.P.4(a)(6) among the circuit courts. In light of Petitioner's failure to timely file a notice of appeal to the Third Circuit, and thus his failure to meet the requirements of the Federal Rules as well as with the decisions of

the Third Circuit, the resolution of any conflict is irrelevant to the ultimate outcome. As a result, the question posed by Petitioner does not merit further consideration. *See Board of Educ. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting); *Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring); *id.* at 368 (Rehnquist, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR THE PETITIONER

The Petition demonstrated that there is a direct conflict between the Third Circuit's decision in this case—which held that an untimely *pro se* notice of appeal can *never* qualify as a motion to reopen under Federal Rule of Appellate Procedure 4(a)(6)—and the holdings of at least five other courts of appeals. (Pet. 7-12.) In those circuits—the First, Second, Fourth, Tenth, and Eleventh—courts will construe a notice of appeal as a motion to reopen under Rule 4(a)(6) if the notice indicates that the would-be appellant did not receive notice of entry of judgment from the district court in a timely fashion. This issue is an important and recurring one because *pro se* litigation is so common, because unschooled *pro se* litigants can be expected to make the error at issue in this case on a regular basis, and because access to an appellate court is frequently the only way a *pro se* litigant has to vindicate important rights, such as the parental rights at issue here. (Pet. 16-17.)

1. Respondents do not seriously dispute that there is a sharp conflict among the courts of appeals concerning whether a *pro se* litigant's notice of appeal can ever be construed as a Rule 4(a)(6) motion. Respondents the Family Court of New Castle County, Delaware and Master Loretta Young of the Family Court of New Castle County, Delaware (together, "the Delaware Respondents") concede the conflict outright. (Del. Opp. 6.) Respondent John W. Nails disputes the conflict only semantically, by pointing out that just two circuits—the Third in the decision below and the Eleventh—have analyzed the question by comparing the language of Rule 4(a)(6) to the language of Rule 4(a)(5). (Nails Opp. 7.) But this is sleight of hand. It is an attempt to shift the focus from legal conclusions (which is where it belongs) to legal analysis. While legal analysis is obviously of some interest, at the certiorari stage the central focus is usually on the decisions themselves and whether they will lead to conflicting results in cases involving similarly situated

parties. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 225 (8th ed. 2002) (noting that the Court rarely grants certiorari to resolve "differences between general principles or the reasoning involved in . . . two decisions"). The Third Circuit's decision in this case ensures that *pro se* litigants in Petitioner's situation will not have the same opportunity to pursue an appeal that they would have if they were litigating in the federal courts of the First, Second, Fourth, Tenth, or Eleventh Circuits. Accordingly, the "actual split" is the five-to-one split described in the Petition. Indeed, the recent decision in *Global Index, Inc. v. Mkapa*, No. 04-7016, 2004 WL 1368856 (D.C. Cir. June 17, 2004), cited by Respondent Nails (Nails Opp. 7 n.2, 11), raises a question whether the D.C. Circuit may have adopted a view close to the court below's, thus deepening the split.

2. There can be no doubt that the issue here is important and recurs frequently, albeit often in the unpublished realm in which *pro se* litigants operate. Again, the Delaware Respondents make no effort to dispute this fact. Respondent Nails does dispute it after a fashion, but only by noting that the issue lacks "significant national implications for all federal appellants" and figures only rarely in published opinions. (Nails Opp. 19.) The fact that the issue concerns only *pro se* litigants, not "all federal appellants," is irrelevant—otherwise this Court would never hear cases about *pro se* procedure, as it has not infrequently done. *See, e.g.*, *Houston v. Lack*, 487 U.S. 266 (1988); *Haines v. Kerner*, 404 U.S. 519 (1972). As for the suggestion that published opinions on the question presented are few and far between, that is simply the nature of *pro se* litigation—*pro se* litigants will rarely have the knowledge or resources to brief the Rule 4(a)(6) issue or even to raise it in a way that would likely result in a published opinion.

Indeed, given the nature of the question presented, no doubt many cases are resolved adversely to would-be appellants by way of summary dismissals that are

unaccompanied by any opinion, published or otherwise. Thus, the extent of the conflict is likely even greater than the identifiable split would suggest. The Third Circuit's decision in this case, which is certainly the fullest statement of the view that a *pro se* notice of appeal can never be construed as a motion to reopen under Rule 4(a)(6), thus offers an unusual and especially good vehicle for resolving the question. And now that there are carefully reasoned, published decisions on both sides of the question, there is little, if anything, to be gained by letting the issue percolate further.

3. The Petition demonstrates that the Third Circuit's decision elevates form over substance by insisting on a talismanic use of the word "motion" or something like it. That word is, after all, the only thing that distinguishes a "motion" pointing out late receipt of the district court's judgment from a "notice of appeal" pointing out the same thing. (Pet. 12-15.) The Delaware Respondents do not appear to disagree. At one point, they even cite with approval the Eleventh Circuit decision with which the Third Circuit disagreed. (Del. Opp. 6 (citing *Sanders v. United States*, 113 F.3d 184 (11th Cir. 1997).) Respondent Nails, by contrast, devotes eight pages of his opposition to arguing that the Third Circuit was right on the merits. (Nails Opp. 11-18.) But he largely misses the point, because he tackles the wrong argument. Instead of considering whether a *pro se* notice of appeal *that mentions late receipt of the district court's judgment* is equivalent to a separate motion that says the same, Nails addresses the argument that what he calls a "bare notice of appeal" should be construed as a motion to reopen under Rule 4(a)(6). (Nails Opp. 2.) But that is a straw man; it is not hard to understand why a court might be reluctant to construe a "bare" notice of appeal as a Rule 4(a)(6) motion, since there is nothing in a bare notice to indicate that late receipt of the district court's judgment—the particular problem Rule 4(a)(6) is designed to address—might account for the untimeliness. The argument

Respondent Nails attacks is also the wrong argument on the facts of this particular case. Petitioner's notice of appeal is not a "bare" notice; it states that Petitioner received notice of entry of judgment on May 6, 2002—just three days before the notice of appeal was filed—and uses underlining to highlight that fact. (Pet. App. 40a.)

4. As noted, the Delaware Respondents agree that there is a circuit split, do not disagree that it is important and recurring, and even seem to accept that the Third Circuit's categorical rule refusing to construe any notice of appeal as a motion to reopen may be unfair in certain cases. (Del. Opp. 6.) Their sole argument against certiorari is that they believe Petitioner will ultimately lose in the district court even if he wins in the Supreme Court, because, in their view, he cannot satisfy Rule 4(a)(6). (Del. Opp. 8-9.) But it is not clear whether Petitioner would win or lose under Rule 4(a)(6), and in any event the prospect of a possible eventual loss in the trial court is not a ground for declining to grant certiorari. If it were, this Court would decide very few cases, since a reversal in the Supreme Court will rarely guarantee that a petitioner will ultimately prevail in the lower courts.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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